SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1058

THE UNITED STATES, PETITIONER

vs.

ALGERNON BLAIR, INDIVIDUALLY, AND TO THE USE OF ROANOKE MARBLE & GRANITE COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

1 In the Court of Claims of the United States

No. 43548

ALGERNON BLAIR, INDIVIDUALLY, AND TO THE USE OF ROANOKE MARBLE & GRANITE COMPANY, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

I. Petition

Filed April 27, 1937

To the Honorable the Chief Justice and Associate Judges of the United States Court of Claims:

1. The plaintiff, Algernon Blair, is a citizen of the United States of America and a resident of the city of Montgomery in the State of Alabama. Plaintiff is now and at all times pertinent to the cause of action herein set forth was engaged in the general contracting and building construction business.

2 2. Roanoke Marble & Granite Company, Inc., a subcontractor of plaintiff, as hereinafter set forth, is a corporation organized and existing under the laws of the State of Virginia and at all times pertinent to the cause of action herein set forth was engaged in the marble, granite, tile, and terazzo business, having its principal place of business at Roanoke, Virginia.

3. On or about December 2, 1933, plaintiff entered into a written contract with the defendant in and by which plaintiff agreed to furnish all labor and materials, and perform all work required for wrecking certain then existing buildings, etc., and constructing and finishing complete a hospital and adjacent buildings and roads at Veterans' Administration Facility, Roanoke, Virginia, not including the installation of plumbing, heating, incinerator, or electrical equipment (which are hereinafter called "mechanical equipment"), for the consideration of $852,517.00 in accordance with certain specifications, schedules, and drawings, all of which were by reference made a part of said contract.

4. A true copy of those provisions of said contract of December 2, 1933, which are material to plaintiff's claims is attached hereto and made a part hereof by reference and marked Exhibit A. A true copy of those provisions of the specifications thereunder which are material to plaintiff's claims is attached hereto and made a part hereof by reference and marked "Exhibit B."

5. Thereafter, on, to wit, January 30, 1934, by mutual consent of the parties said contract was modified and extended to include certain other buildings and certain changes in the buildings covered by the original contract at an additional consideration of $375,906.68, making

the total contract price to be paid to plaintiff by defendant
3 $1,228,423.68. The details of such modifications and extensions are not material to the consideration of the claims herein presented.

6. Defendant's "Invitation for Bids," upon which plaintiff relied in making his bid and entering into said contract, provided that:

"Bids will be considered only from responsible individuals, firms or corporations. In determining the lowest responsible bidder, consideration will be given as to whether the bidder involved maintains a permanent place of business; has adequate plant equipment to do the work properly and expeditiously, has a suitable financial status to meet obligations incidental to the work and has appropriate technical experience."

Before plaintiff submitted his bid for said work, he was furnished by defendant with a copy of certain specifications which defendant represented would be and were later included in a contract covering the installation of the above-mentioned "mechanical equipment" which work was not covered by plaintiff's contract, which specifications provide that:

"All work under this section of the specifications shall be completed at a date not later than that provided for in the contract for general construction for the completion of work under that contract. Failure to comply with the above will result in the deduction of liquidated damages from contract payments as hereinbefore provided under 'General Conditions.'

"The plumbing work shall be performed in harmony with the other work on the buildings and shall be performed at such times as may be directed by the Superintendent of Construction so as to not delay any other work on the buildings."

4 and under the head "Heating":

"All work under this section of the specifications shall be completed at a date not later than that provided for in the contract for general construction."

In submitting his said bid plaintiff relied upon the statements and representations so set out in the invitation for bids and in the "mechanical equipment" specifications, and computed his costs and bid price and entered into his original and modified contract on the assumption that defendant would comply with said statements and representations.

7. On or about December 1, 1933, defendant entered into a written contract with Redmon Heating Company, a corporation having its principal office at Louisville, Kentucky, under and by which said Redmon Heating Company (hereinafter called Redmon) agreed to furnish all labor and materials and perform all work required in the installation of said "mechanical equipment" in said Veterans Facility, which said contract included by reference therein the "mechanical equipment" specifications described in paragraph 6 of this petition. The said contracts of plaintiff and Redmon provided that:

"The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor."

Despite the provisions of defendant's "Invitation for Bids," set forth in Paragraph 6 hereof, the bid of said Redmon was considered and accepted and the said contract was entered into between defendant and Redmon at a time when defendant well knew or by reasonable diligence could have ascertained that Redmon was not a responsible corporation; did not have adequate plant equipment to do the work properly and expeditiously; and did not have a suitable financial status to meet obligations incidental to the work covered by its contract.

8. Plaintiff's said contract provided that the work to be done thereunder should begin within 10 days and be completed by 420 calendar days after the date of receipt by plaintiff of notice from defendant to proceed, except that the Administration Building should be completed thirty days, and the Storehouse Building should be completed sixty days prior to the expiration of said period of 420 days, and that the radial brick chimney and sufficient work on the Boiler House should be done to permit the installation of boilers and equipment ninety days prior to the expiration of said period of 420 days. Plaintiff received said notice to proceed on December 21, 1933, whereupon plaintiff promptly made arrangements to procure all of the necessary labor and material for the faithful and diligent performance of the said contract, and began work within ten days thereafter, on to wit, December 28, 1933. Plaintiff soon thereafter found himself seriously handicapped and delayed by the failure of Redmon to enter upon the performance of and to perform its contract in harmony with plaintiff's work. Redmon was notified by defendant on or about December 19, 1933, to proceed with the performance of its contract which it should have begun by about December 29, 1933, but Redmon did practically nothing on its said work prior to March 19, 1934, and Redmon's delay was promptly and repeatedly called to defendant's attention, and defendant's agents and representatives well knew that Redmon's long delay in beginning its work was seriously delaying and interfering with plaintiff's work and causing him monetary loss. Nevertheless, defendant failed to compel Redmon to perform its contractual obligations and failed to cancel Redmon's contract until to-wit, June 27, 1934, when Redmon abandoned it. After defendant's threat to cancel said contract unless it had a representative at the job by March 19, 1934, its representative arrived there on that date, but Redmon never had sufficient men, equipment or materials at the job to perform its work with the speed and in the orderly fashion required by its contract, and as a result of Redmon's failure

plaintiff was seriously hampered and delayed in the performance of his contract. This condition was repeatedly called to defendant's attention by plaintiff, who demanded repeatedly that defendant require Redmon to perform its work in accordance with its contract.

Redmon likewise failed to furnish plaintiff with measurements, drawings and other information needed to harmonize and fabricate the work to be done by each of them, and failed to submit to defendant shop drawings for approval, in connection with items vitally affecting plaintiff's work. These repeated failures and defaults of Redmon were promptly and repeatedly called to defendant's attention by plaintiff but defendant failed to require Redmon to comply with its contract so as not to delay plaintiff and cause him loss.

On July 12, 1934, Virginia Engineering Company, acting under a contract with the surety on Redmon's bond with defendant,
7 took over the work on which Redmon had defaulted, but the said Engineering Company was so handicapped by Redmon's said delays and inefficiency that the said Engineering Company was also delayed in its performance of said work and did not complete the same until, to-with, February 14, 1935, all of which interfered with the due and orderly performance by the plaintiff of its contract with the defendant.

9. Plaintiff, in bidding on this contract, and in planning the work after the contract was signed, estimated and scheduled the same for completion by November 1, 1934, and could and would have completed said work by said date if permitted to proceed in the orderly fashion contemplated by his contract and the defendants' contract with Redmon. On account of Redmon's failures and delays above set out and defendant's failure to compel Redmon to perform its obligations under its contract and numerous interferences by defendant, plaintiff was unable to complete his said work until February 14, 1935, as a result of which plaintiff suffered at least the following losses and damages:

1. Salaries of supervisory and clerical forces at Roanoke for 3½ months	$9,226.80
2. Extra overhead expenses at Montgomery office for 3½ months	18,303.59
3. Extra cost of liability and compensation insurance	5,237.16
4. Extra heating cost	4,021.16
5. Extra expense incurred in field resulting from delay in approval of heating plans	290.89
6. Extra cost of grading and walks	13,336.36
Total	50,416.12

8 10. On, to wit, December 6, 1933, defendant appointed one P. M. Feltham as supervising superintendent of construction on the work covered by plaintiff's said contract, and appointed one T. G. Dodd as assistant to said Feltham, and they continued in charge of said work until it was completed. Throughout this time, said Feltham and Dodd acted with extreme hostility toward plaintiff and his representatives at the job, and continually harrassed and hindered them in the performance of the work by demanding, insisting and requiring that plaintiff incur expenses not required under said con-

tract, all as more fully set forth in paragraphs 11 to 14, inclusive, of this petition.

11. In laying brick for the outside walls of said buildings plaintiff employed and used only efficient first class bricklayers, who began this work in the manner properly and customarily used in said work, and which would have resulted in construction strictly in accordance with the contract and specifications, namely, by what is known in the trade as "over-end." Under this method, the bricklayers work from the inside of the building, first standing on the concrete floor slabs and then on inside scaffolds, which are inexpensive and may be removed and used from floor to floor as the building progresses. However, said Feltham and Dodd required the bricklayers to work from outside the walls, which necessitated the building of scaffolds to the full height and width of each wall. Plaintiff duly protested to said Feltham and Dodd against this ruling, but they adhered thereto and even required plaintiff to tear down portions of wall built by the over-end method, although said portions complied in every respect with the contract and specifications. The specifications required that the exterior
9 brickwork should be laid with unifomity regarding openings so that the brick and joints on each side of the center line of each opening should be similar. Feltham and Dodd insisted that this provision required exact correspondence, to the fraction of an inch, between the wings of each building, and that where a stretcher or header brick was laid under the center of a window in one wing it should be duplicated under the corresponding window in the opposite wing, even though the duplication would be impossible to detect with the eye from any position from which both windows could be seen. Feltham and Dodd further insisted that the vertical line between facing brick should not vary even slightly and at times measured the variation with a plumb line, and, even where it could not be detected with the eye, required plaintiff to remove and relay such bricks, all in violation of the terms of the contract and specifications and over plaintiff's vigorous protest. Feltham and Dodd further illegally required plaintiff to lay out on paper, in advance, a diagram of the brickwork, which action was not required by plaintiff's contract and was done over plaintiff's vigorous objection and protest.

As a result of the acts of Feltham and Dodd related in this paragraph of the petition plaintiff was required to expend and did expend, to wit, $26,032.96 in excess of the reasonable cost to plaintiff of doing such brickwork in compliance with the provisions of said contract and specifications, which said sum was wholly lost to plaintiff.

12. Said contract contained the following provision:

"All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient
10 to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all sub-

contractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.10
Unskilled labor	.45

"A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand.

"The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as 'unskilled laborers'."

Said contract did not stipulate the amount of wages, hourly or otherwise, to be paid to any class of labor other than skilled and unskilled. The economical performance of the carpentry work under said contract and the customary manner of doing such work required the employment of many men generally known as "semi-skilled laborers," to whom it was the general custom in such business to pay more than to unskilled laborers but substantially less than to skilled laborers. The usual and customary wage of such semiskilled laborers was, to wit, 55 cents per hour. Nevertheless, said Feltman and Dodd arbitrarily, unlawfully and in breach of plaintiff's contract, ruled and notified plaintiff that he must pay $1.10 per hour to all such semiskilled laborers. Said Feltham and Dodd thereafter arbitrarily, unlawfully and in breach of plaintiff's contract, and over plaintiff's objection and protest, compelled plaintiff to pay for such semiskilled labor at the rate of $1.10 per hour, when the reasonable wage for such labor was, to wit, 55 cents per hour. Had plaintiff been permitted to pay semiskilled labor at 55 cents per hour to do the work ordinarily and customarily done by such laborers on this kind of construction, the total labor cost of the carpentry work under the contract would have been only, to wit, $86,738.04. As a result of said arbitrary and unlawful ruling of said Feltham and Dodd, however, the cost of such labor on the carpenter work covered by plaintiff's contract amounted to $117,189.05, with a resulting loss of $30,451.01 to plaintiff.

11

13. Said contract provided that:

"To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United Statts Employment Service."

Performance of the work covered by plaintiff's contract required the placing and tying of large quantities of reinforcing steel rods before the pouring of concrete. It was the general custom in doing such work to employ semiskilled laborers, known as reinforcing steel

workers, at to wit 60 cents per hour, for work of this kind. In February 1934 when plaintiff was ready to start the placing of such steel, he called upon the said Government Employment Bureau at Roanoke to furnish men to do that kind of work, but was informed by the Bureau that it had no available reinforcing steel workers and no men experienced in that kind of work. Said Bureau then
12 agreed with plaintiff that it would furnish common laborers of more than average intelligence, to whom plaintiff could teach this work, and that they would be paid at the rate of 60 cents per hour. Plaintiff thereupon employed all such laborers as the Bureau furnished for this work, and shifted some common laborers already on the job to this work, paying all such men engaged in placing and tying said rods at the rate of 60 cents per hour. However, in the latter part of March 1934 said Feltham and Dodd arbitrarily, unlawfully, in breach of plaintiff's contract, and over plaintiff's objection and protest, compelled plaintiff to pay $1.10 per hour to all such reinforcing steel workers, and to pay additional sums for work already done and paid for at the lower rate so as to bring said pay up to $1.10 per hour. Plaintiff was thereby forced to pay for work theretofore done additional sums aggregating $135.75 and was thereafter required by said Feltham and Dodd to pay to said laborers for the future work, to wit, $4,365.00 in excess of the proper and prevailing wage of 60 cents per hour. Many of the laborers so supplied by said Bureau to plaintiff for use on said reinforcing steel work were utterly incompetent, and were discharged by plaintiff but said Feltham and Dodd arbitrarily, unlawfully and in breach of plaintiff's contract, and over plaintiff's objection and protest, compelled plaintiff to reemploy many of said discharged laborers. The incompetency and inexperience of the men supplied for this work were so great that it became necessary for plaintiff's supervisors and foremen to devote a great deal of time to instructing and assisting them, which resulted in serious delays and extra expense.

Plaintiff sought permission of said Feltham and Dodd to se-
13 cure competent reinforcing steel workers from sources other than said Employment Bureau, but said Feltham and Dodd arbitrarily and unlawfully refused plaintiff permission so to do. As a result of such action by Feltham and Dodd, the cost of the reinforcing steel labor under said contract exceeded the amount for which plaintiff could have secured such labor, by the amount of at least $8,827.05, which said sum was wholly lost to plaintiff.

14. Immediately after plaintiff began work under said contract, said Feltham and Dodd began to act in a very arbitrary, unreasonable, and unfair way in their work as superintendents of construction, and continued to so act throughout the performance of said contract. They made unfair, misleading and inaccurate reports to the Veterans Administration concerning the progress and manner of performance of the work by plaintiff, falsely and maliciously accusing plaintiff of failure to perform in accordance with the terms of said contract and

specifications; required plaintiff to perform acts not covered by the contract; arbitrarily refused to permit plaintiff to use facilities which plaintiff was plainly entitled to use; complained unfairly and without cause about plaintiff's methods of operation; demanded unreasonably long advance notice of inspections, and then unduly delayed such inspections; interfered directly with plaintiff's laborers and mechanics in their work; and indulged in harsh and unfair criticism of the work in the presence of plaintiff's employees and in various ways lowered the morale of his employees. These acts interfered with the orderly progress of plaintiff's work and had a demoralizing effect upon plaintiff's employees, greatly increasing the cost to plaintiff of performing the contract.

14 Solely as a result of these acts and this hostile and unfair attitude of said Feltham, it became necessary for plaintiff to send from Montgomery, Alabama, to Roanoke and Washington two of his employees, N. G. Andrew and W. M. Ellingsworth (whose ordinary duties required their presence at plaintiff's Montgomery office), for the purpose, first, of trying to persuade said Feltham to adopt a fair and reasonable attitude toward plaintiff and his construction employees, and to confer frequently with officials of the Veterans Administration in Washington and establish to their satisfaction that many of said complaints and reports of said Feltham were untrue and that all of them were unfair. This work occupied all of said Andrew's time for seven months, and all of said Ellingsworth's time for 4⅓ months. In addition, as a result of said acts and attitude of said Feltham, it became necessary for plaintiff and others in his employ to make frequent trips to Roanoke and Washington for the same purposes. The additional cost and expense incurred and paid by plaintiff, as salary and traveling expenses of said Andrew and Ellingsworth, and as traveling expenses of plaintiff and other employees for the purposes aforesaid aggregated $5,890.70, all of which was wholly lost to plaintiff.

15. In its "Invitation for Bids" and in said contract with plaintiff, defendant represented that sandstone, required in the construction of buildings covered by the contract, was available locally in the regular course of business in sufficient quantities for the work in question, in that said specifications furnished under the "Invitation for Bids" provided as follows:

15 "Stone work indicated on drawings as rubble shall be a random broken range ashlar, local sand-tone as hereinafter specified."

Plaintiff's contract with defendant also provided:

"Changed conditions.—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the

contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract."

The specifications also required plaintiff to submit an alternate proposal for using brick facing at these locations instead of the rubble stone. Before making his bid for said contract, plaintiff used reasonable diligence to ascertain the cost to him of local sandstone at the site, relying upon said representation that such stone existed and could be purchased from a local quarry in regular course in sufficient quantities for said contract, or, if not, that defendant, pursuant to Article 4 of the contract would either accept the alternate proposal for using brick or make equitable adjustment to prevent plain-
16 tiff incurring a loss. Plaintiff received a quotation from one L. A. Scholz for furnishing such stone delivered at the site at $8.00 per ton. In bidding on this contract, plaintiff based his bid upon the price so quoted. When plaintiff started work under this contract, he discovered that said L. A. Scholz had the only quarry in the vicinity for that kind of stone which was being worked at all, but that his facilities were utterly inadequate to furnish the stone in the quantities needed, and that there were no other local producers who could furnish such stone.

Plaintiff could have secured similar stone in sufficient quantities from producers in Tennessee and Ohio at prices far below plaintiff's estimated cost. Plaintiff thereupon appealed to the Veterans' Administration to permit him to obtain the stone from other than local sources or to accept his alternate bid for brick facing in lieu of the stone facing, which action would have resulted in a substantial reduction in the contract price. The Veterans' Administration refused both requests and required plaintiff to use only local sandstone for said work. As a result of this requirement plaintiff was forced to produce the said stone locally himself, and he made the most economical arrangement possible, namely: plaintiff entered into an agreement with said Scholz, whereby plaintiff paid Scholz a royalty for the privilege of removing the stone from Scholz' property; purchased and installed air compressors, drills, and other necessary tools and equipment; built the necessary sheds and provided everything else necessary for the most economical operation of the quarry; and quarried and manufactured the stone necessary to comply with said contract. After completion thereof, plaintiff sold the tools and equipment for the best
17 obtainable price. The total net cost of this quarrying operation to plaintiff was $28,833.04, whereas, if plaintiff had been allowed to purchase such stone from other localities where it was available, the total cost thereof would not have exceeded, to wit,

$14,685.50, and the difference of $14,147.54 was wholly lost to plaintiff by reason of said acts of defendant's agents.

16. On December 18, 1933, plaintiff entered into a subcontract with the aforesaid Roanoke Marble & Granite Company, Inc., hereinafter called the subcontractor, for the furnishing and installation by the latter of all tile and terrazzo work used in connection with his contract for the construction of the said Veterans Hospital at Roanoke, Virginia, for the sum of $26,135, to which on February 8, 1934 there was an addenda providing for additional work at an additional cost of $8,612.

On January 5, 1934, plaintiff also entered into a subcontract with the aforesaid subcontractor for the installation by the latter of all marble and soapstone required in connection with his said contract for construction of a Veterans Hospital at Roanoke, Virginia, for the sum of $2,150, to which on February 5, 1934, there was an addenda providing for additional work at an additional cost of $750.80.

True copies of the provisions of said subcontracts of December 18, 1933, and January 5, 1934, and said addenda which are material to the claim of plaintiff to the use of said subcontractor as set forth in this paragraph are attached hereto and made a part hereof by reference, marked Exhibits C–1, C–2, C–3, D–1, and D–2, respectively.

As required by the defendant, said subcontractor executed an
18 agreement with plaintiff by virtue of which all terms set forth in plaintiff's contract were made to apply to the work of the subcontractor insofar as applicable which included Article 18, subsection (a) of plaintiff's contract which provides:

"All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.10
Unskilled labor	0.45"

Article 18, subsection (d) of said contract provides:

"The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as 'unskilled laborers'."

Well knowing of the above provisions at the time its bid was prepared and in accordance with the custom of the trade, the subcontractor made its estimate and based its bid on its right and intention to use, along with skilled labor (otherwise known as skilled mechanics), what is known as semiskilled labor to serve as assistants to the skilled mechanics. The rate of pay for such semiskilled labor was $0.60 per hour. The subcontractor's estimate of the cost of labor on the work to be performed by it, and upon which its bid submitted to the general

contractor was based, was made in reliance on the terms of the aforesaid subsection (d) of Article 18 and was in the amount of $9,207.30.

19 In beginning its work the subcontractor employed such skilled mechanics and semiskilled laborers and common laborers as the nature of the work at that time properly required. Shortly after such work had been commenced the said T. G. Dodd, defendant's assistant superintendent of construction, arbitrarily and in breach of said contract, notified representatives of the subcontractor that the subcontractor was prohibited from employing on said work any semiskilled or intermediate labor of any kind, and that only skilled labor at $1.10 per hour and common labor at $.45 per hour could be used by the subcontractor on such work. The subcontractor vigorously protested against said ruling to the said Dodd at the time said ruling was made but said Dodd steadfastly and emphatically continued to enforce said arbitrary and illegal ruling until the work was finished.

In the class of work involved herein the cost of labor necessary for the production of the finished work, where only skilled mechanics and common labor are used, is much greater than where semiskilled labor is used with skilled mechanics, due to the fact that the work progresses much more quickly where the skilled mechanic has the assistance of semiskilled laborers instead of merely common labor. After the ruling made by the said Dodd, and because of said ruling, only skilled mechanics and common laborers were used by the subcontractor in carrying out its work under said subcontract, although semiskilled labor was at all times available during the period of time involved.

The subcontractor's total labor cost under its said subcontract amounted to $18,615.44. Had the subcontractor been permitted to employ semiskilled labor at the prevailing rate of 60 cents per

20 hour, the rate for ordinary and customary work done by such laborers on this kind of work, the total labor cost under the subcontract would have been only, to wit, $10,770.00. The subcontractor, therefore, as the direct result of the unlawful, arbitrary, and unreasonable ruling of defendant's agent the said Dodd in breach of the defendant's contract, has suffered a loss of $8,629.98.

17. Defendant has paid to the plaintiff the price named in the modified contract herein described but defendant has failed to pay any part of the claims herein made. No action on plaintiff's said claims has been taken either by Congress or by any department of the government. The plaintiff is the sole owner of the claims set forth in this petition, except as to claim set out in paragraph 16 of this petition, for which plaintiff sues to the use of Roanoke Marble & Granite Company, his subcontractor. No assignment or transfer of said claims or of any part thereof or interest therein has been made. The plaintiff is justly entitled to the amounts herein claimed from the United States after allowing all just credits and setoffs. Plaintiff and his said subcontractor have at all times borne true allegiance to the gov-

ernment of the United States, and neither of them has in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government.

Wherefore, plaintiff prays judgment in his favor and against the United States for the sum of, to wit, $135,765.38, and further prays judgment in his favor, to the use and benefit of Roanoke Marble & Granite Company, for the sum of $8,629.98, or a total of, to wit, $144.395.36, with interest thereon as provided by law.

21 And plaintiff prays the court for such other, further and general relief as to the court may appear just and equitable.

ALGERNON BLAIR.
Algernon Blair.

UNDERWOOD, MILLS & KILPATRICK,
912 American Security Bldg.,
Washington, D. C.,
Attorneys for Plaintiff.

[Duly sworn to by Algernon Blair and C. B. Wilson; jurats omitted in printing.]

23 *Exhibit A to petition*

This Contract, entered into this Second day of December 1933, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Algernon Blair of the city of Montgomery, in the State of Alabama, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for wrecking existing buildings, etc., and constructing and finishing complete at Veterans' Administration Facility, Roanoke, Virginia, Main Bldg. #2; Dining Hall and Attendants Qtrs. Bldg. #4 and Connecting Corridor #2–4; Colored Patients Bldg. #7; Boiler House Bldg. #13 including Radial Brick Chimney; Laundry Bldg. #14; Storehouse Bldg. #15; Garage and Colored Attendants Qtrs. Bldg. #16; Nurses Qtrs. Bldg. #17, decreased in length as specified in Alternate "f"; Managers Residence Bldg. #18; Officers Duples Qtrs. Bldg. #19; Sewage Pump House Bldg. #23; Pipe Tunnels and Manholes between Dining Hall and Attendants Qtrs. Bldg. #4 and Laundry Bldg. #14 and Boiler House Bldg. #13 and Laundry Bldg. #14; Flag Pole; also roads, walks, grading, and drainage in connection with these buildings; but not including Plumbing, Heating, Incinerator, Electrical Work, and Outside Distribution Systems, Electric Elevators, Steel Water Tank and Tower #24 and Refrigerating and Ice Making Plant; for the consideration of Eight Hundred Fifty Two Thousand Five Hundred Seventeen Dollars ($852,517.00) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications for Buildings and Utilities for Veter-

ans' Administration Facility at Roanoke, Virginia, November 9, 1933, and the schedules and drawings mentioned therein; two Addenda No. 1 dated November 20, 1933 and No. 2 (telegram) dated November 28, 1933; as contemplated by Item 1 and Alternate (f) under Item 1 of the Contractor's proposal dated November 29, 1933, and letter of acceptance dated December 2, 1933.

The work shall be commenced within Ten (10) Calendar Days after date of receipt of notice to proceed and shall be completed within Four Hundred twenty (420) Calendar Days after date of receipt of notice to proceed except that Administration and Storehouse Buildings will be completed Thirty (30) and Sixty (60) Days, respectively, prior thereto and Radial Brick Chimney and sufficient work in Boiler House Building to permit the installation of boilers and equipment will be completed Ninety (90) Days prior thereto.

ART. 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall, at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ART. 4. Changed conditions.—Should the contractor encounter, or the Government discover during the progress of the work subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

ART. 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective mate-

rial and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge all reasonable facilities, labor and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor and material. If such work is
26 found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(b) Domestic materials.—In the performance of this work the contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except as provided in the specifications.

(d) Local preference.—So far as practicable, and subject to the provisions of sections (b) and (c) of this article, preference shall also be given to the use of locally produced materials if such use does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the contracting officer.

ART. 13. Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ART. 18. Wages.—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum
27 hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.10
Unskilled labor	$0.45

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations but such obligations shall be subject to collection only by legal process.

ART. 19. (a) Labor preferences.—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivisions and/or county in which the works is to be performed and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(b) Employment services.—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the
28 United States Employment Service: Provided, however, That organized labor, skilled and unskilled, shall not be required to register at such local employment agencies but shall be secured in the customary ways through recognized union locals. In the event, however, that qualified workers are not furnished by the union locals within 48 hours (Sundays and holidays excluded) after request is filed by the employer, such labor may be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and local unions, the labor preferences provided in section (a) of this article shall be observed.

ART. 22. Persons entitled to benefits of labor provisions.—The contractor will extend to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the contractor and such laborer or mechanic.

ART. 25. Termination for breach.—In the event any of the provisions of articles 7. (b), (c), and (d), 11, 18–24, 26, of this contract are violated by the contractor or any subcontractor on the work, the contracting officer may terminate the contract by written notice to the contractor. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby; and the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

ART. 28. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.

(b) The term "contracting officer" as used herein shall mean
29 the officer who signs the contract on behalf of the Government, and shall include his duly appointed successor or his duly authorized representative.

In witness whereof the parties have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By L. H. TRIPP,
Director of Construction,
Veterans' Administration.
ALGERNON BLAIR,
By JOHN T. CLARK,
Contractor, Montgomery, Ala.

Two witnesses:
C. F. VOLTZ.
ETHEL G. GUY.

30 *Exhibit B to petition*

(5–A) Invitation for Bids.—Sealed bids, in triplicate, subject to the conditions contained herein, will be received by the Veterans' Administration * * * until 2:30 P. M., December 1, 1933, and then publicly opened for furnishing all labor and materials and performing all work required for constructing and finishing complete at Veterans' Administration Facility, Roanoke, Virginia, Buildings and Utilities. * * * Separate bids will be received for (a) General

Construction including Radial Brick Chimney; (b) Plumbing, Heating including Incinerator, Electrical Work and Outside Distribution Systems; (c) Electric Elevators; (d) Steel Water Tank and Tower; and (e) Refrigerating and Ice Making Plant; all as set forth on bid form.

Bids will be considered only from responsible individuals, firms, or corporations. In determining the lowest responsible bidder, consideration will be given as to whether the bidder involved maintains a permanent place of business; has adequate plant equipment to do the work properly and expeditiously; has a suitable financial status to meet obligations incident to the work and has appropriate technical experience. * * *

(6-A) Guaranty will be required with each bid to insure the execution of the contract and no bid will be considered unless it is so guaranteed. The bidder at his option may furnish a guaranty bond, a certified check or United States Bonds in amount not less than 25 per cent of amount of bid including all work bid upon. Performance bond will be required in an amount not less than 50 per cent of the contract price. * * *

The right is reserved, as the interest of the Government may require, to reject any and all bids, to waive any informality in bids received, and to accept or reject any items of any bid, unless such bid is qualified by specific limitation. * * *

(7-A) General Information (a) General Intention.—The contractor shall, unless otherwise specified, wreck and remove existing
31 buildings, etc., completely prepare the site for the building operations and furnish all labor and materials required to construct and finish the project as shown by the drawings, described by the specifications and noted in his bid, such of the following work as may be included in the awards; * * *

(8-A) All work required in connection with the utility services for existing and new buildings and other work of the project, unless otherwise noted, shall be as specifically required under applicable sections "Plumbing," "Heating," "Electrical Work," "Electric Elevators," etc., of the specifications. * * *

Separate Bids will be received for (a) General Construction including Radial Brick Chimney and Pipe Tunnel; (b) Plumbing, Heating, and Electrical Work and outside distribution systems and outside service connections; (c) Electric Elevators; (d) Steel Water Tank and Tower and (e) Refrigerating and Ice Making Plant; all as set forth on bid form.

If included in the award, contractor shall complete the various buildings, utilities, or other work of the project in the time stated, as specifically noted under the Items of the Bid Form. * * *

(9-A) Method of Procedure.—All work shall be executed in such a manner as to interfere as little as possible with the normal functioning of the station and with the work done by others. Roads shall be kept clear of materials, etc., at all times and in such a manner as not to prevent or delay hospital traffic to any of the buildings. * * *

(1G-2) Nomenclature.—In the specifications where the word "Administrator" is used it shall mean the Administrator of Veterans' Affairs, Veterans' Administration. Where the word "superintendent" is used it shall mean the Superintendent of Construction detailed by the Veterans' Administration to superintend the construction of this work. * * *

Government Superintendent.—A superintendent is to be detailed for the purpose of superintending the construction of this work, but such superintendence may not be continuous for the reason that he may also be employed upon other buildings, or he may be
32 detailed for other purposes and his absence at any time is not to be considered as a reason for delay in carrying out the contract. The Administrator or his representatives shall have free access at all times to the work and shops for the purpose of making inspection and the contractor shall provide safe access to all parts of the work and shall cooperate and assist the representatives of the Veterans' Administration in making such inspection. The superintendent's directions shall be supplementary to the specification and not in conflict with the contract requirements. No claim for an extension of time or for additional compensation will be entertained by the Government except as provided for in the contract. * * *

Equipment.—The contractor shall furnish adequate and suitable scaffolding, machinery, tools, utensils, etc., necessary for the proper carrying out of his contract. All equipment shall be kept in a safe condition until removed. * * *

(1G-3 1G-4) Wage Law.—(a) Under contracts in excess of $5,000.00, the rate of wages for all laborers and mechanics employed by the contractor or any subcontractor or the public buildings covered by this contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the state in which the public building is located. * * *

(1G-5 1G-6) Shop Drawings.—The contractor shall submit four copies of full size details when required and all shop or setting drawings and schedules required for the work of the various trades and the Veterans' Administration will pass upon them with reasonable promptness. Drawings should not be rolled for shipment but should be folded with printed side out: The Veterans' Administration's approval of such drawings or schedules shall not relieve the contractor from responsibility for deviations from drawings or specifications, unless he has in writing called the superintendent's attention to such deviations at the time of submission, nor shall it relieve him
33 from responsibility for errors of any sort in shop drawings or schedules. * * *

(1G-8) Use of Roadways.—(a) For their hauling, contractors must use only the established roads and such temporary roads which may be necessary for their work and as may be authorized by the superintendent. Such temporary roads shall be constructed by the con-

tractors at their own expense. When necessary to cross curbing, sidewalks, or similar construction, they must be protected by well constructed bridges. * * *

(b) Where new permanent roads are shown on drawings and are to be a part of this contract, the contractor shall have the privilege of immediately constructing them so as to facilitate building operations and these roads shall be used by all who have business thereon within the zone of building operations but at the completion of all work, the roads must be left in perfect condition. * * *

(1G–8 1G–9) Temporary Heat.—(a) The contractor shall furnish heat to prevent injury to work or material through dampness or cold. At all times when there is concrete not thoroughly set, and after starting to apply the first coat of plastering, he shall maintain a temperature of at least 40° F. For 10 days previous to the placing of the interior wood finish and during the time that varnish is being applied, a temperature of at least 70° F. shall be maintained in the building. * * *

(c) The use of salamanders or other types of heating which may smoke and damage the finished walls, etc, will not be allowed. * * *

(2C–3 2C–4) Forms.—(a) All necessary forms, centering, cores, molds, etc., except where metal forms are used, shall be built of well seasoned, sound, good quality lumber and, except props and braces, shall be free from loose knots and dressed smooth on side where concrete is to be exposed to view. Provide sinkages for drips where required. Rough forms may be used for work to be plastered
34 providing tight joints are maintained. Forms shall be stiff, true, and plumb, well-braced and sufficiently strong to carry the dead weight of the construction as a liquid together with the moving loads of men and materials without appreciable deflection, and sufficiently tight to hold concrete without leakage. * * *

(b) All forms for beams, girders, and lintels shall be so designed that at least one side may be removed without disturbing the bottom portion of the form and its supports. Supporting posts shall rest upon wedges to be loosened prior to removal, to eliminate undue stress in floor slabs. Forms for columns shall have removable section on two sides at the bottom for cleaning out forms, and for inspection of steel before concrete is poured. * * *

(c) Forms shall be put together in an approved manner, secured against warping or displacement and kept wet when necessary to prevent shrinking. All material for forms shall be thoroughly cleaned before reusing. Crown all beam centering not less than ½″ to every 16′–0″ of span. * * *

(e) The contractors for Plumbing, Heating, Electrical Work, Etc., shall furnish all sleeves for pipe lines and inserts for support of pipe hangers required for their work and shall designate the places where they shall be installed, but the general contractor shall install them in the designated places and shall be responsible for maintaining sleeves

plumb and in alignment and shall provide suitable means for holding sleeves securely in place. * * *

Reinforcement.—Reinforcement consisting of steel bars, wire fabric, or expanded metal shall be of sizes and spacings shown on drawings. The bars shall be of an approved deformed type. * * *

(2C–5) (e) Place steel accurately and securely in position in such a way that it will not be disturbed. Bars shall be bent where called for on drawings or hereinafter specified, and all bending shall be accurately done.

(f) All reinforcement shall be secured in place with standard
35 metal spacers and ties of approved description. Supports shall be placed at intersections of bars running in different directions so that every bar is properly supported and tied and held in proper position while concrete is poured and graded. * * *

(2C–6) Mixing and Placing.—(a) A machine batch mixer shall be used for all concrete, except that where only a small amount is required the mixing may be done by hand. The mixer shall be provided with mechanical means of regulating quantity of water and the amount shall be accurately measured to give the required uniform consistency as directed. The type of machine selected shall be subject to approval by the superintendent. * * *

(c) All ingredients shall be thoroughly mixed until they are uniformly distributed throughout the mass with sufficient clean, pure water added to produce a concrete of the proper consistency. Immediately after being mixed, the concrete must be conveyed to the desired point and carefully deposited in place in such a manner as to prevent the separation of the mortar and stone, using suitable tampers or other means to insure the removal of voids, air pockets, or honeycombing. * * *

(2C–7) (d) The concrete however, may be conveyed by spouts or chutes to hoppers and from there distributed to the forms by means of wheelbarrows and concrete carts. Spouts or chutes shall be carefully constructed and installed with a slope not flatter than 1 to 3 nor steeper than 1 to 2. The concrete shall be so mixed as to travel fast enough to keep the chute clean but the movement of concrete shall not be so fast as to allow the materials to segregate. After concrete has been placed in the chute the use of additional water, or mechanical and manual methods to aid its movements are prohibited. * * *

(e) Except where vibrating is required, spade next to forms to give a smooth dense surface where concrete is to be left permanently exposed and every effort shall be made to avoid visible lines of junctures between concrete desposited at different times. * * *

(f) Concrete columns, walls and all concrete sections over
36 3′–0″ deep shall be vibrated. Concrete for these sections shall be placed quickly in layers not exceeding 8″ in thickness before previous layer has set, each layer shall be tamped down by hand, and at approximately two and one-half foot intervals the concrete

shall be compacted with a mechanical ram or vibrator. This machine shall be of an approved type and where placed in concrete shall give not less than 4,000 vibrations per minute in all directions on a horizontal plane. Portion of machine producing vibrations shall not be secured to forms or reinforcing steel and when placed in concrete shall be operated in one place for approximately thirty seconds or until a concrete of maximum density is produced. Workmen skilled in using machine shall perform this work. Forms shall not be displaced or reinforcement disturbed by the vibrator. * * *

(5C–1) Bricklaying, Etc.—Brickwork shall be built plumb and to a line. Bricks shall be laid in a full bed of cement mortar with shove joints and with each course completely flushed with mortar.

(5C–2) The bond of all facing brick shall be maintained plumb and the joints shall be of practically uniform width throughout. Exterior brickwork shall be laid out with uniformity regarding openings and breaks in walls so that the brick and joints on each side of the center line of each opening, etc., shall be similar. * * *

(9C–1) The contractor shall furnish and set all limestone, sandstone, or granite to complete the work as indicated on drawings or as specified. * * *

All stonework throughout the job shall be limestone, sandstone, or granite as indicated or specified. Materials indicated on drawings as stone shall be cut limestone or sandstone except where granite is indicated or specified. Stonework indicated on drawings as rubble shall be a random broken range ashlar local sandstone as hereinafter specified. * * *

All rubble or broken range ashlar stone work shall be a local sandstone of buff color, laid with a variegated run of quarry color, the darker shades predominating. * * *

37 (9C–3) Stonework indicated as rubble shall be a random broken range ashlar with all bed joints truly horizontal. * * *

If the alternate for brick in lieu of rubble is accepted, all stonework shall be smooth machine dressed limestone or sandstone except granite as hereinbefore specified. * * *

(12CC–1) Terrazzo.

(12CC–2) Materials and Workmanship.—(a) The underbed for terrazzo base and floors, etc., consisting of one part portland cement and four parts sharp screened sand free from loam, shall be applied or spread plumb or level respectively. Undercoat mortar for base shall be brought to plumb surfaces 3/8" back of finished face of base and well scratched as a preparation for subsequent applying of terrazzo aggregate. Underbed of floor shall be brought to a level surface 3/4" below finished floor. * * *

(b) Aggregate for base, borders and thresholds of run-in-place or precast terrazzo shall be composed of marble chips or granules and approved neat portland cement of white or light gray color. The mixture of chips in the finished product for Type "A–1" aggregate which

generally shall be used for base work, consisting of white, yellow or buff, sienna, black, and other colored granules mixed with light gray portland cement and only enough water to bring the mortar to a plastic condition after being thoroughly worked. A sprinkling or potting of the required color chips shall be added to produce the finished product hereinafter specified. * * *

(c) All metalized terrazzo floors and coved base required for operating suite section located in the third floor of Main Building shall be of terrazzo aggregate hereinafter referred to as Type "B" aggregate composed of approximately 50 percent No. 1 size and 50 percent of No. 2 size of "Cardiff Green" or approved similar shade of green marble granules mixed with neat portland cement of light gray color. * * *

38 (d) All marble chips for aggregate shall be of approved tested hard domestic marbles of color and quality required. * * *

(e) Terrazzo base, borders, thresholds, or other work shown on drawings of terrazzo throughout the buildings, unless otherwise specified, shall be of Type "A–1" terrazzo. * * *

(f) The nature of marble aggregate, texture, and color cast of finishing surfaces for terrazzo work of the various types, unless otherwise specified, shall be similar to illustrations as reproduced on plates noted in catalogue of The National Terrazzo and Mosaic Contractors Association on file in the Administration, as follows:

Type "A–1"—Plate No. 31; Type "B"—Plate No. 4.

(g) All finished terrazzo work shall show 85% granules and be free from cracks, holes, pits, waves, or other defects due to faulty material, overgrinding or workmanship. * * *

(h) All terrazzo shall be laid by experienced and competent workmen, familiar with this class of work. * * *

(34C–5) If the concrete is placed in cold weather, straw or other suitable material shall be used to prevent freezing. * * *

(1P–1) Standard Specification for General Conditions for Plumbing. * * *

Time and Manner of Performing the Work.—The plumbing work shall be performed in harmony with the other work on the buildings and shall be performed at such times as may be directed by the Superintendent of Construction, so as not to delay any other work on the buildings.

The plumbing contractor shall do all necessary cutting or alteration of structural work required for the plumbing, the same to be subject to the approval of the Superintendent of Construction.

The plumbing contractor shall clear away, as directed by the Superintendent of Construction, all rubbish resulting from his operations; he shall not deface or damage any portion of the buildings, and shall deliver all work under his contract in a clean, perfect and complete condition. * * *

39

(A1H–1) General Conditions for Heating. * * *

The work shall be performed in harmony with other work on the buildings and at such times as may be directed by the Superintendent of Construction.

The heating contractor shall do all necessary cutting or alteration of structural work required for the heating, the same to be subject to the approval of the Superintendent of Construction. * * *

(A9H-1) Outside Steam Distribution—Note.—The contractor shall furnish all labor and materials and perform all work required for Outside Steam Distribution as shown on the drawing or specified in Section 9H, together with such modifications as given in the following amendments: * * *

(9H-1) Outside Steam Distribution—Work Included.—This section of the specification shall include the furnishing of all labor and materials for the installation of complete underground steam distribution between buildings and between buildings and manholes, expansion bend pits, anchor pits, etc., where indicated on the steam plot plan.

Underground steam supply and return lines may be installed in terra-cotta or concrete pipe trench as indicated by detail on the drawings and as hereinafter specified.

The work includes all excavation, back filling, and grading, and all reinforced concrete required for the construction of concrete pipe trenches, manholes, anchor pits, and expansion bend pits, etc., all pipe fittings, valves, traps, anchors, supports, insulation, painting, and all other materials, appurtenances, and work necessary to complete the installation of underground steam and return distribution. * * *

(A1-E-1) Electrical Work.

The General Conditions at the head of the whole specifications shall govern where applicable to these specifications for electrical work.

(1E-1) Electrical Work—Work Included.—The aim and object of these specifications is to include the provision of all labor, and material necessary to install a complete system of electrical service apparatus, and accessories specified herein and in the amendments hereto or shown on the drawings which accompany these specifications and will form a part of the contract. The General Conditions at the head of the whole specifications shall govern, where applicable to these specifications for electrical work.

Time for Completion.—All work under this section of the specification shall be completed at a date not later than provided for in the contract for General Construction (See Construction Section of Specifications and Proposal Sheets) for the completion of work under that contract. Failure to comply with the above will result in the deduction of liquidated damages from contract payments as hereinbefore provided under "General Conditions."

41 *Exhibit C–1 to petition*

ALGERNON BLAIR

MONTGOMERY, ALA.

Subcontract with Roanoke Marble and Granite Co., Roanoke, Virginia, Amount $26,135.00

NOTE.—In this document, the Contractor, the Subcontractor, the Architect and the Owner are treated as if each were of the singular number and masculine gender.

This agreement, made this 18th day of December 1933, by and between Algernon Blair, of Montgomery, Alabama, hereinafter called the Contractor, and Roanoke Marble and Granite Company of Roanoke, Virginia, hereinafter called the Subcontractor, witnesseth, that,

Whereas, the said Contractor has heretofore entered into a contract with The U. S. Veterans' Administration of Washington, D. C., hereinafter called the Owner, to perform certain labor and furnish certain material for the erection, construction and completion of The United States Veterans Hospital Buildings, at Roanoke, Va., as per plans and specifications prepared by The U. S. Veterans' Administration of Washington, D. C. Architects.

Now, therefore, said Contractor and said Subcontractor, for and in consideration of the mutual and reciprocal obligations hereinafter stipulated, Contract and Agree as follows:

42 ARTICLE I. The said Subcontractor hereby agrees to furnish all the material and perform all labor necessary to complete the following part or parts of the work included in said contract between the Contractor and said Owner in all respects, as the said Contractor is required by said plans and specifications to do; namely: All Tile and Terrazzo Work in connection with my contract for construction of U. S. Veterans Hospital at Roanoke, Va., based on Item 1 of the bid blank and also Alternate F which reduces the length of the Nursers' Quarters.

In addition to this, I reserve the right to accept your prices for adding additional buildings in case the Veterans' Bureau awards these buildings to us within sixty days.

Order No. 1: P.V.

The prices for these buildings are as follows:

Item 1-A	$1,329.00
Item 1-B	6,126.00
Item 1-C	1,157.00
Item 1-D	460.00
Item 1-E	492.00

It is understood and agreed that tile work in connection with this contract includes all floor, wall, faience and any other tile work in connection with my contract, with the exception of rubber tile, asphalt tile, and linoleum.

It is understood and agreed that the work is to be in accordance with plans and specifications and contract requirements and that you are to pay laborers not less than 45 cts. per hour and mechanics not less

than $1.10 per hour, and that you are otherwise to operate in accordance with N. R. A. and the Government contract requirements in every respect, and in this connection I must ask that you send us a certificate immediately setting forth the fact that you are so operating.

Your letter of December 15, 1933, states that you understand the wage schedule on this job to be $1.10 for mechanics and 45 cts.
43 for laborers, per hour, and your attention is directed to the fact that the ab've represent minimum wages payable to these classifications, and that if a wage scale is set by the Government which will require you to pay more than $1.10 per hour for mechanics that you are to comply with the Government requirements without any change whatsoever in the amount or terms of this contract.

* * * * * * * *

ART. IX.—The said Contractor hereby agrees to pay to the said Subcontractor for such labor and material herein undertaken to be done and furnished the sum of Twenty Six Thousand One Hundred Thirty Five ($26,135.00) Dollars, subject to additions and deductions as hereinbetore provided, and such sum shall be paid by the Contractor to the Subcontractor as the work progresses, based upon estimates and certificates of the Architect, 10% to be retained, and upon evidence that all claims for labor and material are settled, final payment shall be made within 30 days after the completion of the work included in this contract, and written acceptance by the Architect, and full payment therefor by the Owner.

* * * * * * * *

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

ROANOKE MARBLE & GRANITE CO., INC.
By (Sgd) C. B. WILSON, *Pres.*
ALGERNON BLAIR.
By (Sgd) C. F. VOLTZ.

Witness:
(Sgd) B. H. GOGGIN.
(Sgd) M. T. DAWSON.
(Sgd) BERNICE C. DENIS.

44 *Exhibit C–2 to Petition*

ROANOKE, VA.

ALGERNON BLAIR

CONTRACTOR

Montgomery, Ala.

[Copy]

FEBRUARY 8, 1934.

ROANOKE MARBLE & GRANITE CO, *Roanoke, Va.*

GENTLEMEN: Reference is made to our order #14–RV covering your contract for all tile and te'razzo work in connection with my

contract for construction of Veterans Administration Facility at Roanoke, Virginia. As you know, the Veterans Administration has awarded us three additional buildings with corridors involving alternates A, B, C, C–A, and C–C and accordingly we hereby accept your prices for these alternates, as your work is affected, as follows:

Item #1 A	$1,329.00
Item #1 B	6,126.00
Item #1 C	1,157.00
Total addition to order #14–RV—for alternates accepted by the Veterans Administration as covered by this order	8,612.00

It is noted that our order does not cover alternate item #1 C–A, increasing the length of the Recreation Building #5, and upon making investigation, we find that at no time did you quote us a figure for #1 C–A nor did we ask for a figure on this item. This alternate was overlooked evidently and, since there is some additional terrazo involved and we have no reason to believe you have included this additional amount with your Item #1 C we think you should be allowed the proper amount of money for the additional work.

45 Accordingly, based on the quantities involved and the same unit prices as the rest of the contract, we arrived at a price of $56.00 covering your additional work as follows:

110 lineal feet terrazzo base and borders
8 lineal feet 9″ border
6 plinths

124 lineal and square feet @ 45c equals $55.80.

This letter will act as a supplement to our order #14–RV in accepting your alternate prices contained therein for tile and terrazo and our order #14–RV–1 in the amount of $56.00 is attached covering additional terrazzo work (or its substitute) for alternate Item 1 C–A.

The total amount of your contract for tile and terrazzo work in connection with buildings we now have under contract for the Veterans Hospital at Roanoke is arrived at as follows:

#14–RV	$26,135.00
Alternates in above order	8,612.00
Our order #14–RV–1	56.00
Total	34,803.00

If our order #14–RV–1 is acceptable as shown, kindly acknowledge receipt of same as well as this letter and be governed accordingly in the performance of your work.

Yours very truly,

ALGERNON BLAIR.
By (Sgd.) McF.

McF:K.
cc—Job.
cc—Ott.

46 *Exhibit C–3 to Petition*

Formal order

ALGERNON BLAIR

CONTRACTOR

Montgomery, Ala.

FEB. 8, 1934.

Job Roanoke U. S. V. H.

To ROANOKE MARBLE & GRANITE CO., *Roanoke, Va.*

All additional Terrazzo work (or its substitute) required by increasing size of Recreation Building #5, as covered by Bid Items 1 (C–A), and as indicated by plans and specifications.

Stipulations and requirements of original order 14–RV to govern this order.

Amount, $56.00.

ALGERNON BLAIR:
By (Sgd) McF.

McF:K.
Order No. 14–RV–1.

47 *Exhibit D–1 to petition*

ALGERNON BLAIR
MONTGOMERY, ALA.

Subcontract with Roanoke Marble & Granite Co., Inc., Roanoke, Va.
Amount $2,150.00

NOTE.—In this document, the Contractor, the Subcontractor, the Architect, and the Owner are treated as if each were of the singular number and masculine gender.

This agreement, made this 5th day of January 1934, by and between Algernon Blair of Montgomery, Alabama, hereinafter called the Contractor, and The Roanoke Marble & Granite Company, Inc., of Roanoke, Virginia, hereinafter called the subcontractor, witnesseth, that,

Whereas the said Contractor has heretofore entered into a contract with The U. S. Veterans Administration of Washington, D. C., hereinafter called the Owner, to perform certain labor and furnish certain material for the erection, construction, and completion of U. S. Veterans Hospital Buildings, at Roanoke, Va., as per plans and specifications prepared by U. S. Veterans Administration of Washington, D. C., Architects.

Now, therefore, said Contractor and said Subcontractor, for and in consideration of the mutual and reciprocal obligations hereinafter stipulated, Contract and Agree, as follows:

48 ARTICLE I.—The said Subcontractor hereby agrees to furnish all the material and perform all labor necessary to complete

the following part or parts of the work included in said contract between the Contractor and said Owner in all respects, as the said Contractor is required by said plans and specifications to do; namely: Set All Marble and Soapstone required in connection with my contract for construction of U. S. Veterans Hospital at Roanoke, Virginia, based on Item 1 of the bid blank and also Alternate F, which reduces the length of the Nurses Quarters.

In addition to this, I reserve the right to accept your prices for adding additional buildings in case the Veterans Administration awards these buildings to us within sixty (60) days. The prices for these buildings are as follows:

Item 1A	$191.00
Item 1B	438.30
Item 1C	121.50

It is understood and agreed that this contract includes the furnishing of all labor and includes necessary erecting hardware, curtain rods, shower curtains, etc., also wire anchors required. The contractor, however, is to haul the marble from the railroad siding to the building site and is to furnish the subcontractor with setting material, such as moulding plaster, glycerine, and litharge, etc., required in connection with the work. The contractor is also to furnish the subcontractor with setting drawings, furnished by the marble and soapstone subcontractors, and the subcontractor is to do all drilling and fitting necessary for the application of all hardware, fittings, etc., at the job.

It is understood and agreed that the work is to be in accordance with plans and specifications and contract requirements in every respect, and that the subcontractor is to pay not less than $1.10 per hour for mechanics and not less than 45c per hour for common labor-
49 ers, and that the subcontractor is otherwise operating in accordance with N. R. A. and the Government contract requirements in every respect, and in this connection I must ask that you send us a certificate immediately setting forth the fact that you are so operating.

The General Contractor to take all measurements and be responsible for the correctness of same and the marble is to be fabricated cut, ready to set, delivered at the building in which to be used.

The above paragraph applies to soapstone also.

* * * * * * *

ART. IX. The said Contractor hereby agrees to pay to the said Subcontractor for such labor and material herein undertaken to be done and furnished the sum of Two Thousand One Hundred Fifty ($2,150.00) Dollars, subject to additions and deductions as hereinbefore provided, and such sum shall be paid by the Contractor to the Subcontractor as the work progresses, based upon estimates and certificates of the Architect, 10% to be retained, and upon evidence that all claims for labor and material are settled, final payment shall be made within 30 days after the completion of the work included in this con-

tract, and written acceptance by the Architect, and full payment therefor by the Owner.

* * * * * * *

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

ROANOKE MARBLE & GRANITE CO., INC.
By (Sgd.) C. B. WILSON, *Pres.*
ALGERNON BLAIR.
By (Sgd.) C. F. VOLTZ.

Witness:
(Sgd.) B. H. GOGGIN.
(Sgd.) M. T. DAWSON.
(Sgd.) F. S. MCFADEN.

CFV:ML.

50 *Exhibit D-2 to petition*

ALGERNON BLAIR
CONTRACTOR
Montgomery, Ala.

[Copy]

FEBRUARY 5, 1934.

ROANOKE MARBLE & GRANITE COMPANY,
Roanoke, Virginia.

GENTLEMEN: Reference is made to our order No. 31-RV covering your contract for setting all marble and soapstone required in connection with buildings for Veterans Administration Facility at Roanoke, Virginia.

The Veterans Administration has awarded us three additional buildings with their corridors, involving Alternates A, B, C, C-A, and C-C, and accordingly, we hereby accept your prices for these alternates, as your work is affected, as follows:

Item 1A	$191.00
Item 1B	438.30
Item 1C	121.50
Total addition to order	750 80

This letter shall act as a supplement to our order No. 31-RV, and you will please be governed accordingly in the performance of the work involved.

Kindly acknowledge receipt of this letter promptly.

Yours very truly,

ALGERNON BLAIR.
By (Sgd.) McF.

McF:ML.
CC:Job.
CC:WBO.
CC:Order File—31-RV-1.

51 II. *General traverse*

Filed June 5, 1937

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(Sgd.) SAM E. WHITAKER,
Assistant Attorney General.

III. *Argument and submission of case*

On February 5, 1942, the case was argued and submitted on merits by Mr. H. C. Kilpatrick and Mr. Richard S. Doyle for plaintiff, and by Mr. Joseph M. Friedman for defendant.

53 IV. *Special findings of fact, conclusion of law, and opinion of the court by Littleton, J., dissenting opinion by Madden, J.*

Filed October 5, 1942

Mr. H. Cecil Kilpatrick and Mr. Richard S. Doyle for the plaintiff. Messrs. Mills & Kilpatrick, and Mr. Fred S. Ball were on the brief.

Mr. Joseph M. Friedman, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Rawlings Ragland and Mr. Henry A. Julicher were on the brief.

Plaintiff seeks to recover $146,091.60 as damages, representing increased costs and expenses in performance of a contract. Plaintiff alleges these excess costs were not necessary or required by the contract and specifications and were for the most part the result of unreasonable, unauthorized, or arbitrary, capricious and grossly erroneous acts, conduct, and requirements of the defendant's designated and authorized agents and officers which amounted to breaches of the express and implied provisions and conditions of the contract.

The defenses interposed are (1) that if plaintiff suffered delay in the prosecution and completion of the work, the defendant was not the cause of it and is not liable for any increased cost which may have been incurred by reason thereof; (2) that there was no breach of any express or implied provision of the contract and specifications; (3) that the defendant's agents and officers having charge of the work and the
54 enforcement of the provisions of the contract and specifications did not impose any unreasonable requirements and did not in any case in their acts, rulings, or decisions under the contract act unreasonably, arbitrarily, capriciously, or so erroneously as to imply bad faith; (4) that plaintiff has no right to recover because he did not strictly comply in those instances in connection with which claims are made for alleged unnecessary costs and damages, with the literal provision of the second proviso of Article 9 of the contract with refer-

ence to protest in writing and the provisions of such proviso and Article 15 as to appeal; and (5) that the evidence does not sufficiently establish the excess costs and damages claimed.

Special findings of fact

1. Plaintiff, a resident of Montgomery, Alabama, is engaged in the general contracting business, having his principal office at Montgomery. Plaintiff's subcontractor, Roanoke Marble & Granite Company, Inc., a Virginia corporation, with its principal office at Roanoke, is engaged in the marble, granite, tile, and terrazzo business.

The invitations for bids, to be opened December 1, 1933, together with detailed specifications, drawings, and standard contract forms, were issued by defendant and delivered to prospective bidders November 9, 1933. These invitations for bids and specifications called for separate bids to be considered in connection with the making of contracts for (1) "General Construction"; (2) "Plumbing, Heating, and Electrical Work"; (3) "Electric Elevators"; (4) "Steel Water Tank and Tower"; and (5) "Refrigerating and Icemaking Plant." The invitation for bids and the specifications upon which plaintiff submitted his bid, and on which he was awarded a contract, were for "General Construction" of the buildings, roads, and other work called for therein. The invitation for bids stated that separate bids would be received and separate contracts made for the several classes of work mentioned, and the General Provisions of the Specifications (section 1G, par. 7) and the Standard Forms of Contracts awarded, including the contract and specifications of plaintiff, provided (section 13) that

"The Government may award other contracts for additional
55 work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor."

Under this and other provisions of the contracts the defendant assumed the obligation and duty of taking such action at the proper time as would prevent any contractor with defendant from unreasonably delaying or interfering with the work and progress of any other of the government contractors. The defendant failed to fulfill and discharge this obligation and duty under its contract with plaintiff, and by reason of such failure plaintiff was unreasonably delayed and put to extra and unnecessary costs and damages.

The specifications, on all of the five different classifications of work mentioned above and for which bids were asked, were in one document and were delivered to each of the bidders.

2. In the invitations for bids, the printed bid form, and the specifications, the bidders were not permitted to state or propose the period of time within which the work called for by the specifications and drawings, upon the basis of which they were to submit their bids, was

to be completed, but the period of time for the completion of the work called for was fixed and stated by the defendant as 420 calendar days after the date of receipt of notice to proceed. The last paragraph of Item I of the printed bid form for General Construction which plaintiff used in making his bid provided as follows: "Performance will begin within ten (10) calendar days after date of receipt of notice to proceed and will be completed within four hundred and twenty (420) calendar days after date of receipt of notice to proceed, except that Administration and Storehouse buildings will be completed 30 and 60 days, respectively, prior thereto and Radial Brick Chimney and sufficient work in Boiler House Building to permit installation of boilers and equipment will be completed 90 days prior thereto." This identical provision was also written into Article 1 of the con-
56 tract subsequently executed, as the last paragraph of that Article.

Bidders for the plumbing, heating, and electrical work called for by the specifications were not permitted to state or fix the time within which they would complete the work called for and for which bids were submitted, but the invitations for bids, the printed form of bid, and the specifications fixed the period for completion. The printed bid form on which the bidders for plumbing, heating, and electrical work submitted their bids provided as follows:

"The above bid is made with the understanding that all work covered thereby will be completed at a date not later than that provided in the contract for "General Construction," with the exception that plumbing, heating, and electrical work in connection with Boiler House Building will be required to be completed 30 days in advance of other work and such work in connection with the Administration and Storehouse Buildings shall be completed 30 and 60 days, respectively, prior thereto."

This provision was incorporated in the contract as subsequently made for the plumbing, heating, and electrical work.

3. December 2, 1933, the defendant accepted plaintiff's bid for the general construction work and on that date advised plaintiff in part that "Acceptance is hereby made of Item I together with Alternate (f) under Item I of your proposal dated November 29, 1933, which was submitted in response to advertisement dated November 9, 1933, and opened in this Service December 1, 1933." Item I of plaintiff's bid was $866,780 for the units of work specified therein, and in subdivisions (a) to (k), inclusive, plaintiff stated the amounts by which his total bid above mentioned would be increased or decreased under certain alternates under Item I. Alternate (f), which the defendant originally accepted in its notice to plaintiff on December 2, provided for a decrease of $14,263 in the total amount bid, in respect to building No. 17. The bid as first accepted on December 2 was therefore in the total amount of $852,517. In that acceptance, however, defendant advised the plaintiff that "In making this award the Government reserves the

right to accept also any one or more of alternates (a), (b), (c),
57 (d), (e), and (1) under Item I of your proposal at any time within sixty (60) calendar days after December 1, 1933, the date when bids were opened."

Upon the acceptance of plaintiff's bid in the amount of $852,517, as above stated, the defendant prepared the contract dated December 2, 1933, and sent the same to plaintiff for execution and return with performance bond. Plaintiff duly executed the contract and returned the same with performance bond dated December 14, 1933, and the contract was thereupon executed by defendant, represented by L. H. Tripp, Director of Construction of the Veterans' Administration, as contracting officer. Thereafter, on January 30, 1934, the defendant, by its contracting officer, wrote plaintiff a letter, entitled "Change Order 'A' (Increase)—$361,785.00," in part as follows:

"Confirming telegram dated January 30, 1934, and as contemplated by your proposal dated November 29, 1933, Administrative letter of acceptance dated December 2, 1933, and your telegram dated January 26, 1934, acceptance is hereby made of alternates (a), (b), (c), (c-a), and (c-c) under Item I of your proposal.

* * * * * * *

"The contract price, in accordance with your proposal dated November 29, 1933, is hereby increased by the sum of Three Hundred Sixty-One Thousand Seven Hundred Eighty-Five Dollars ($361,785.00)."

Shortly thereafter plaintiff's alternate bid (1) under Item I, in the amount of $14,500.00 was reduced to $14,100.00 by agreement of the parties and as so modified was accepted by defendant. The total of plaintiff's main and alternate bid prices, as above mentioned, $1,228,402.00, was thereafter adjusted by agreed changes to an aggregate of $1,228,423.68.

4. The contract between the parties upon that portion of plaintiff's bid as originally accepted and the specifications forming a part of the contract required plaintiff to

"* * * furnish all labor and materials, and perform all work required for wrecking existing buildings, etc., and constructing and finishing complete at Veterans' Administration Facility, Roa-
58 noke, Virginia, Main Bldg. #2; Dining Hall and Attendants Qtrs. Bldg. #4 and Connecting Corridor #2-4; Colored Patients Bldg. #7; Boiler House Bldg. #13 including Radial Brick Chimney; Laundry Bldg. #14; Storehouse Bldg. #15; Garage and Colored Attendants Qtrs. Bldg. #16; Nurses Qtrs. Bldg. #17, decreased in length as specified in Alternate "f"; Managers Residence Bldg. #18; Officers Duplex Qtrs. Bldg. #19; Sewage Pump House Bldg. #23; Pipe Tunnels and Manholes between Dining Hall and Attendants Qtrs. Bldg. #4 and Laundry Bldg. #14 and Boiler House Bldg. #13 and Laundry Blg. #14; Flag Pole: also roads, walks, grading and drainage in connection with these buildings; but not including Plumbing, Heating, Incinerator, Electrical Work, and Outside Distribution Systems; Electric Elevators, Steel Water Tank, and Tower #24

and Refrigerating and Ice Making Plant; for the consideration of Eight Hundred Fifty Two Thousand Five Hundred Seventeen Dollars ($852,517.00) in strict accordance with the specifications, schedules, and drawings, * * * designated as follows: Specifications for Buildings and Utilities for Veterans' Administration Facility at Roanoke, Virginia, November 9, 1933, and the schedules and drawings mentioned therein; two Addenda, No. 1 dated November 20, 1933, and No. 2 (telegram) dated November 28, 1933; as contemplated by Item I and Alternate (f) under Item I of the contractor's proposal dated November 29, 1933, and letter of acceptance dated December 2, 1933."

Under the alternates of the bid subsequently accepted plaintiff was required to furnish all labor and materials and perform all work required for constructing and finishing complete

"* * * one Administration Building No. 1, including connecting corridor No. 1-2 and retaining wall, one Acute Building No. 6, including connecting corridors Nos. 4-6 and 6-7, and one Recreation Building No. 5, including the increased length as shown on drawings and specified and connecting corridor No. 5-6 decreased to the length shown on Drawing No. C-1 or specified, together with the road work, walks, grading and drainage in connection with these buildings, but not including Plumbing, Heating, Electrical Work and Outside Distribution Systems, all to be performed as an addition to your contract
VAc-424 dated December 2, 1933, and in strict accordance with
59 the specifications dated November 9, 1933, and the schedules and drawings mentioned therein, together with two Addenda, No. 1 dated November 20, 1933, and No. 2 (telegram) dated November 28, 1933, and to be completed at a date not later than the contract date for completion provided in contract VAc-424, except that the Administration Building No. 1 is to be completed Thirty (30) days prior thereto."

The contracting officer mailed plaintiff notice to proceed on December 19, 1933, which was received by plaintiff December 21, thereby fixing February 14, 1935, as the date for completion of all the work called for by the contract under the contract period as fixed by defendant.

5. Plaintiff's engineer, J. E. Lacey, arrived at Roanoke December 19, 1933, and on December 21 with two assistants began clearing brush, trees, etc., and surveying for the purpose of locating building lines, and grades for excavations and soon thereafter a temporary field office was built. Plaintiff's first equipment arrived on the job January 15, 1934, and excavation work was commenced January 16. This work was thereafter diligently carried on by plaintiff, and plaintiff at all times had adequate and sufficient equipment and employes for speedily and adequately carrying on the work covered by the contract and for the completion thereof, as called for and required by his contract, by November 1, 1934. Plaintiff made his bid and

computed the cost to defendant of the entire construction work called for on the basis of the completion thereof by November 1, 1934. Defendant was so notified soon after work was commenced.

6. Under the invitation for bids and detailed specifications issued November 9, 1933, for all plumbing, heating, and electrical work required or necessary to be installed in the buildings to be constructed by plaintiff, in an orderly manner as plaintiff's construction work proceeded, one C. J. Redmon, trading as Redmon Heating Co., with principal office and place of business at Louisville, Kentucky, submitted a bid of $300,000, which was accepted by defendant December 6, 1933. On that date a contract on the standard form between Redmon Heating Co. and the defendant was prepared by the defendant and sent to Redmon for execution and the furnishing of his
60 performance bond. The contract was duly executed by Redmon and returned to the defendant with the performance bond, and was duly executed by defendant, represented by L. H. Tripp, Director of Construction of the Veterans' Administration, as Contracting Officer. Under this contract Redmon was obligated and required to furnish all labor and materials and perform all work required for the complete installation in and at the buildings covered by plaintiff's contract and to be constructed by him, of all plumbing, heating, and electrical work, including all outside distribution systems for all buildings, but not including electric elevators, steel water tank and tower, refrigeration and ice plant. The contracts between plaintiff and defendant and between Redmon and defendant contained a provision that "The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor." Plaintiff at all times throughout the prosecution of the work called for by his contract fully complied with this provision, but C. J. Redmon did not at any time comply with this provision and the defendant delayed unreasonably in taking such action, after repeated protests by plaintiff, as would avoid unreasonable delay to plaintiff.

In accordance with the provision of the printed form of bid on which Redmon submitted his bid, his contract with defendant provided that his work was to be commenced promptly after the date of receipt of notice to proceed and was to be completed at a date not later than that provided in the contract for general construction, with the exception that plumbing, heating, and electrical work in connection with the Boiler House Building was to be completed 30 days in advance of other work and that such work in connection with Administration and Storehouse Buildings was to be completed 30 and 60 days, respectively, prior thereto. The contracting officer mailed to Redmon notice to proceed on or about December 19, 1933, and the same was received by Redmon on or about December 21.

61 Plaintiff's contract (Exhibit 2) and the specifications under plaintiff's and Redmon's contracts (Exhibit 2a) and Redmon's

contract with defendant (Exhibit 13) are in evidence and are made a part hereof by reference.

7. Neither Redmon, the mechanical contractor, nor any representative of his reported at Roanoke, the site of the work, until March 19, 1934, when the superintendent for Redmon Heating Co. arrived at the site of the work after many urgent demands by the contracting officer upon Redmon that he proceed with the work and after the contracting officer advised Redmon in writing that, if he did not have a representative on the site of the work by March 15, his contract would be terminated. Redmon, the mechanical contractor, did not at any time between the date he was given notice to proceed and June 26, 1934, when his contract was abandoned and terminated, as hereinafter set forth, have adequate equipment or men on the job properly to carry on the work called for and required by his contract, and Redmon was not financially able to carry on and complete the work under his contract at any time between the date of the contract and the date on which it was abandoned by Redmon and thereupon terminated by defendant. The failure of Redmon to commence and prosecute the work called for by his contract with defendant, and which was necessary in order that plaintiff might properly proceed with his work, was due to financial difficulties and to willful neglect. Reasonable inquiry by defendant when plaintiff first began to protest in January 1934 would have disclosed these facts. No such inquiry was made by defendant. The failure of the contracting officer to take any action other than to request Redmon to commence and carry on the work called for by his contract was due to false statements and reports, of which plaintiff had no knowledge, by the defendant's authorized officers and agents in charge of the work at the site thereof.

The second paragraph of the invitation for bids issued November 9, 1933, provided as follows:

"Bids will be considered only from responsible individuals, firms or corporations. In determining the lowest responsible bidder, consideration will be given as to whether the bidder involved maintains
a permanent place of business; has adequate plant equipment
62 to do the work properly and expeditiously; has a suitable financial status to meet obligations incident to the work and has appropriate technical experience."

No inquiry or investigation was made by defendant as to Redmon's plant equipment or financial status before he was given the contract for the plumbing, heating, and electrical work necessary to be furnished and installed in connection and cooperation with plaintiff's work.

8. In cases of this kind involving separate and independent contracts for construction and mechanical work, it is the usual and recognized practice for the contractor for the general construction orderly to progress with his work so as to permit the proper installation therein of all necessary mechanical materials and equipment. This the plaintiff at all times did. It is also the usual and recognized

practice that the mechanical contractor must orderly and diligently so prosecute his work as to properly place and install all necessary mechanical equipment and materials as called for in the work of the general contractor so as not unreasonably to delay the progress of the work of the general contractor. This the Redmon Heating Co., as the mechanical contractor, at all times prior to the date on which its contract was terminated failed to do.

9. In accordance with the usual practice in such cases the plaintiff shortly after his contract was entered into prepared a progress schedule showing that he planned and intended to finish all the work called for by his contract and the specifications by November 1, 1934, a period of 314 calendar days from the date of receipt of notice to proceed. This progress schedule was prepared by plaintiff January 24, 1934, and after it had been examined, checked in detail and approved by plaintiff's engineers and construction superintendents, blue prints thereof were made and furnished to the defendant and the defendant's mechanical contractor on March 30, 1934. The progress schedule was delivered to defendant's officers and was posted in their field office at the site of the work.

Defendant's officers in charge of the work as the representatives of the contracting officer paid no attention to plaintiff's progress
63 schedule and they did not, during the performance of the contract work, cooperate with or assist plaintiff in any reasonable manner to the end that he might rapidly and properly carry on his work in accordance with his progress schedule and complete the same within the time shown thereon. It was the desire of the government and the intention of the parties to the contract that plaintiff's work be completed as soon as possible after notice to proceed had been given and the contracting officer so notified plaintiff in the early stage of the work and thereafter. There was no express or implied stipulation or agreement in the contract that defendant would not be responsible or liable to plaintiff in damages for excess costs and expenses occasioned by delay caused by defendant in the completion of the work in less time than the period of 420 days fixed by defendant for the purpose of charging plaintiff liquidated damages, at a specified rate of $175 per day in the event plaintiff failed without the excuses mentioned to deliver the completed work within the time so fixed. A copy of plaintiff's progress schedule is in evidence as Exhibit 16 and is made a part hereof by reference.

January 24, 1934, plaintiff wrote the Redmon Heating Co., at Louisville, Kentucky, in part as follows:

"We expect to carry on our entire building program with considerable speed and hope to have all buildings completed by November 1st.

"Our superintendent in charge of this work is Mr. C. W. Roberts, and the actual planning of the work is being left largely in his hands. You can address him care Algernon Blair, P. O. Box 551, Salem, Virginia, and I suggest that you keep in touch with him so as to keep informed as to our progress and our plans."

The progress which plaintiff planned to make, and on the basis of which he computed and made his bid, and which he would have made except for the delays caused him by the failure of the mechanical contractor properly and orderly to prosecute his work, and the failure of defendant to take proper action with reference thereto, the actual progress which plaintiff was able to make under the conditions encountered and the actual progress which the mechanical contractor, Redmon, made with his work, are shown by Exhibit 147, which is made a part hereof by reference. As an illus-
64 tration of the delay caused to plaintiff's progress by the failure of the mechanical contractor properly to proceed with his work, the proof shows that by May 1, 1934, plaintiff would have completed 30 per cent of his work, whereas, by reason of such delays, he was unable to complete that percentage of his work until after July 15, and the mechanical contractor did not complete as much as 30 per cent of the mechanical work until after the 15th of September 1934.

10. At the time of the contract in suit plaintiff had had 35 years' experience in construction work as a builder. He constructed a number of Federal buildings throughout the country prior to November 1918, and since that time has constructed for the United States many hospital facilities for the Veterans' Administration ranging in cost from $400,000 to $2,750,000, as well as other Federal and State P. W. A. construction projects of the character covered by the contract in suit. Based on his experience in the performance of contracts for many similar construction projects in the past, plaintiff reasonably estimated (and thereupon computed his costs upon the basis of which his bid was made to the defendant under the contract in suit) that he could and would finish all of the work called for by the contract and specifications by November 1, 1934.

In plaintiff's experience of 35 years in construction work he has never failed to complete a project within the time estimated by him. In one instance plaintiff was charged liquidated damages for two days which he disputed but did not deem of sufficient importance to contest. Afterwards it was found that this alleged delay was due to an error of defendant in computing the time allowed under certain change orders for extra work.

11. The defendant was anxious that the work called for by plaintiff's contract be completed at the earliest possible date, and accordingly on April 4, 1934, the contracting officer wrote plaintiff as follows:

"The Federal Emergency Administrator of Public Works has requested the Veterans' Administration to speed up progress on projects financed from funds allocated by that organization, and has sug-
gested that in order to accomplish this, consideration be given
65 to working a double shift on projects in which such an operation is practicable.

"Progress reports covering your contract at Roanoke, Virginia, indicate that while more than three months of the contract time has

passed, only 5% of the work has been accomplished, and that approximately 50% of the progress is credited to outside approach work. In order to complete this project within contract time, it will be necessary to speed up the work materially, and it is requested that you give consideration to working double shift at such time as may be practicable. This matter was discussed with your representative, Mr. Andrews, during his recent visit to this Service, and he stated that arrangements were being made by your office to start double shift on the Roanoke project in the very near future.

"It is requested that you advise this Service what action you are taking in this matter, and when you expect to start double shift on the project in question.

"Upon receipt of your reply, the matter will be taken up with other contractors on the Roanoke project with a view to having them take necessary steps to expedite their part of the work."

Plaintiff's progress with the work called for by his contract was not at any time delayed by failure of the plaintiff to properly prosecute same with all reasonable dispatch under the conditions encountered by him or by any failure of plaintiff to have adequate employees, laborers, material, and equipment.

12. During the performance of the mass concrete work in the buildings called for by plaintiff's contract, certain small portions of concrete were found to be defective when forms were removed. The amount of such defective concrete was less than might reasonably be expected on a job such as the one covered by plaintiff's contract. The entire amount of defective concrete and the cost of removing and replacing the same are correctly shown on plaintiff's Exhibit 143. The total cost of all materials and labor in properly removing and satisfactorily replacing all defective concrete was $535.83. The removal and replacement of the defective concrete did not operate to delay plaintiff in the completion of the entire work called for by the contract within the time contemplated by plaintiff.

66 The defendant's officers in charge of the work at the site thereof arbitrarily and falsely stated and reported to the Federal Emergency Public Works Administration in July and August 1934 while plaintiff was engaged in the performance of his work, that plaintiff had placed and had to tear out and rebuild $30,000 worth of defective concrete and $6,000 worth of defective brickwork. Plaintiff did not place any defective brickwork and did not have to remove any brickwork at any expense because defective. Plaintiff had no knowledge of these charges until June 1935, four months after his contract was completed.

October 5, 1934, the contracting officer wrote plaintiff in part as follows:

"Incidentally and in view of the fact that you are slightly ahead of normal progress based on the original completion date [420 days], I am harboring the pleasant hope that the job may, if anything, finish ahead of time. This indeed would be a source of gratification

to all of us in view of the difficulties which have been encountered along the way."

13. The seven items of plaintiff's claim, totaling $146,091.60, are as follows:

1. Damages representing increased costs resulting from delays in performance of mechanical work	$51,249.32
2. Damages representing costs due to defendant's arbitrary requirement that plaintiff use outside scaffolding in laying brick	25,886.84
3. Damages representing increased costs due to unfair, unreasonable, and arbitrary acts and requirements of defendant's Supervising Superintendent and Inspector	9,033.21
4. Damages representing increased wages paid by reason of defendant's erroneous ruling on wage scale of reinforcing steel rodmen	8,657.05
5. Damages representing increased wages by reason of defendant's erroneous ruling on wage scale for semiskilled carpenters	26,354.19
6. Damages representing increased costs and wages for the use of a subcontractor, Roanoke Marble & Granite Co., Inc., by reason of defendant's ruling as to the wage scale of helpers and semiskilled employes on the work performed by the subcontractor subject to the provisions of plaintiff's contract with defendant	9,730.27
7. Damages due to increased costs of sandstone by reason of defendant's requirement that plaintiff use local sandstone	15,180.52
	146,091.60

67 14. Delays caused by failure of defendant to have mechanical work performed properly.—Early in his work plaintiff advised the defendant's mechanical contractor and the defendant in writing that he had planned and expected to complete the entire work called for by his contract by November 1, 1934. Beginning in January 1934, the contracting officer's attention was repeatedly called to the fact that Redmon's failure to commence any work or to have any men on the job was seriously delaying the progress of plaintiff with the work called for by his contract. Up until the time Redmon abandoned his contract and the same was terminated on June 26, 1934, the plaintiff protested in writing to the contracting officer the delay being caused the plaintiff's work by the failure of Redmon to proceed with his work and maintain reasonable progress. Many such written protests were made by plaintiff, and he also called this continued delay to the contracting officer's attention by telegram, telephone calls, and personal visits to the office of the contracting officer. The action of the contracting officer upon these protests was to write letters to Redmon from time to time urging him to commence his work and to diligently prosecute the same, and advising him that the progress of the construction work was being delayed because of his failure to properly proceed with the work called for and required by his contract and specifications. These requests of the contracting officer were ignored by Redmon except for a promise to have a representative at the site of the work by March 1, 1934, which was not kept. Redmon had not advised the contracting officer as late as March 12, 1934, of the purchase of any materials or the furnishing of any equipment. He did no work of any kind and had no representatives at the site of the work prior to March 19. The reasonable necessities in the circumstances and

known to defendant required the presence of Redmon at the site of the work in January in order properly to coordinate his work with that of plaintiff. Redmon had no men on the job other than his superintendent, and no actual work was done by him until March 28, more than three months after he had received notice to proceed under his contract. On that date Redmon had only four men on his force, including his superintendent. The average number of men
68 which Redmon had on the job during the period between March 28 and June 26, 1934, inclusive, was twelve. He never had more than six or eight men at work at a time. Redmon did not have an adequate force on the job at any time between the date on which he received notice to proceed and the date on which he abandoned his contract. From June 13, 1934, Redmon was financially unable to meet his pay rolls and to furnish the necessary materials, and this continued until June 26, when he advised the contracting officer that he was unable to proceed with his contract. Redmon's entire force on the work on June 26 consisted of only six men. Beginning June 29, 1934, the Maryland Casualty Company, surety on Redmon's bond, undertook to carry on some of the work called for by Redmon's contract, but made unsatisfactory progress with a force of about 12 men per day. On July 16 the Maryland Casualty Company made a contract, with the Virginia Engineering Company to take over Redmon's unfinished work, and this contractor immediately began increasing the working force. By August 1, 1934, the new mechanical contractor had a force of 107 men on the job, and before the end of August it had working on the project more than 200 men.

Redmon did none of the outside work called for by his contract prior to the time it was terminated. Such work was necessary in order that plaintiff might properly proceed with the outside work called for by his contract, and Redmon soon after receiving notice to proceed should, in accordance with usual and customary practice, have had an adequate force and at least two ditching machines, necessary air compressors, picks, shovels, tampers, caulking tools, and a back filler, but he had no such force and none of this equipment on the job at any time. Reasonable cooperation necessary under his contract required that he have a large force of men engaged on this outside work. Orderly and reasonable coordination by Redmon required that many of his outside trenches be dug, his steam, water, drainage and other pipes laid, the trenches refilled and settled before plaintiff could do any substantial part of his outside work. Reasonable cooperation by Redmon with plaintiff required that Redmon begin his outside work in January and complete the same by the latter part
69 of April 1934. Had defendant required Redmon to proceed in a reasonable manner plaintiff could and would have completed all of his outside work, consisting of grading, top-soiling, building and paving roads, curbs, gutters, sidewalks, and parking areas, in early September 1934. As a result of the unreasonable delay in plaintiff's progress caused by failure of defendant to take proper and timely

action concerning performance of the mechanical work and the failure of Redmon to do any substantial amount of such necessary work, and, notwithstanding the efforts made by the Virginia Engineering Company to overcome the delay of the defendant and Redmon in properly proceeding with the mechanical work, which the Virginia Engineering Company was unable to do, plaintiff was required to do most of his outside work under winter conditions in November and December 1934, and January and the first half of February 1935, when weather conditions made this work much more expensive.

Plaintiff was delayed and put to increased expense, particularly with reference to the boiler house, by failure of Redmon to furnish the necessary detailed drawings in connection with the boiler house equipment and recessed radiators under windows in various buildings. Redmon was required under his contract to lay numerous pipes for gas, water, steam, electric, and sewer lines outside the buildings and under the basement slabs. Plaintiff could not pour concrete for basement slabs until Redmon had dug these underground trenches, laid his pipes, and filled and tamped the trenches. Orderly procedure under Redmon's contract required that he perform this underground work in each building immediately after plaintiff had finished the general excavation for such building. By June 26, 1934, Redmon had not performed as much as 6 percent of such work, and that condition existed with respect to most of the fifteen buildings covered by the contract. This failure of Redmon unreasonably delayed the orderly progress of plaintiff's work. Plaintiff was also unreasonably delayed by the delay of Redmon in laying and placing pipes, pipe sleeves, etc., and placing conduits, and his failure to perform in a reasonably expeditious manner his roughing-in work, consisting of placing
70 electrical work and steam, water, gas, and sewage pipes inside of walls. It was necessary for the mechanical contractor to perform this work before plaintiff could proceed with the building and finishing of the walls. Redmon did not at any time have an adequate force of workmen or adequate materials and supplies for the proper prosecution of the work.

Plaintiff's costs were considerably and unnecessarily increased during the performance of work in November and December 1934, and January and February 1935, over what his costs would have been if he had not been delayed by failure of Redmon to properly proceed with his work, and if plaintiff had been permitted to complete the work by November 1. During this period from November 1, 1934, to February 14, 1935, it was necessary for plaintiff to furnish temporary heat in the buildings under construction at a cost of $4,124.73 in excess of the amount which he would otherwise have been required to expend and in excess of the amount which was included therefor in the contract price. In addition plaintiff's reasonable cost of grading and constructing roads and walks was increased because of Redmon's delay by reason of the necessity of heating concrete and asphalt, his inability to pour concrete under freezing conditions, the necessity of keeping

concrete finishers at work at night waiting for concrete to set, the necessity of furnishing antifreeze mixtures in machinery, of draining water from machinery and refilling, and because of frozen water lines and machinery. A further reason for this increased cost was the fact that there were many open or uncut trenches for the mechanical equipment which made it necessary for plaintiff to perform his paving work in small sections. The reasonable extra cost and expenses to plaintiff of grading and building roads and walks as a result of delays caused by Redmon's failure properly to proceed with his work, over what such cost and expenses would otherwise have been, were $12,734.91.

After the Virginia Engineering Company took over the mechanical work it made every effort to overcome the delay which Redmon had caused, by greatly increasing the working force, machinery, and equipment, but it was unable to do so. Plaintiff prosecuted his work with due diligence, but was unable to finish it until February 14, 1935.

71 The progress which plaintiff was able to make under the conditions prevailing and the progress by Redmon during the period February 1 to June 30, 1934, as compared with the Government's estimate of normal progress on the basis of the contract period of 420 days as fixed by defendant, were as follows:

Date	Redmon's progress (%)	Plaintiff's progress (%) (420 days)	Government's "normal" (%) (420 days)
1934			
Feb. 1	0	2.0	2.3
Feb. 28	--	3.4	5.0
Mar. 31	1	5.6	9.0
Apr. 15	1.1	6.9	12.0
Apr. 30	3.6	9.8	16.0
May 15	4.7	13.9	20.0
May 31	5.4	19.6	25.9
June 15	5.8	23.2	30.9
June 26	5.3	--	36.0
June 30		27.0	36.0

Except for delay in mechanical work and other delays caused by defendant, plaintiff's progress would have been far ahead of "normal" on the 420 days' basis, and would have been normal on the plaintiff's basis of 314 days (November 1, 1934). Redmon's percent of progress was of no assistance to plaintiff because the mechanical work which Redmon did perform was so far behind plaintiff's work. Redmon never did any work of consequence which was of any value to plaintiff's proper progress.

During the first six months of the contract period Redmon's progress was only about 1 per cent a month. During the next four months, from July to October, inclusive, plaintiff completed 56.9 per cent of his work and the Virginia Engineering Company completed 55.8 per cent of the mechanical work. The Virginia Engineering Company's monthly progress was about 13.9 per cent, which was no more than reasonable under the requirements of the contract that the mechanical contractor keep up with the work of the plaintiff as

constructing contractor. But even this progress of the new mechanical contractor did not bring the mechanical work current with plaintiff's work, and plaintiff was never able to overcome the serious delay which had occurred. During the period prior to termination of Redmon's contract plaintiff was unable to perform more than an average of 4.5 per cent of work per month. During the subse-
72 quent period when the Virginia Engineering Company was performing the mechanical work, plaintiff was able to perform 10 per cent of the work per month, completing 64.5 per cent of his contract during the last 6½ months of the period.

Plaintiff was not delayed at any time during the contract period by reason of his failure to have on hand at the work a sufficient and adequate force of workmen and all necessary materials, supplies, and equipment. The supervising superintendent of construction, who was the authorized representative of the contracting officer on the job, and his assistant, who acted as Inspector for the defendant, recorded and reported to the contracting officer that plaintiff's progress was being delayed at certain times by reason of the shortage of materials and because of other reasons for which they considered plaintiff responsible other than the delays caused by failure of Redmon properly and diligently to proceed with his work. The contracting officer's authorized representative and his assistant also recorded and reported to the Contracting Office during the period January to June 26, 1934, that the Redmon Heating Co. was not delaying plaintiff's progress, and that plaintiff was delaying the work of the mechanical contractor. The alleged facts so recorded and reported were untrue.

Under the facts, conditions and circumstances which obtained and of which the contracting officer was fully and correctly advised by plaintiff, the defendant delayed unreasonably in taking timely and proper action to prevent delay to plaintiff and in terminating Redmon's contract for his failure properly to proceed with and prosecute his work to the end that such work be kept abreast of that required to be performed by plaintiff.

Plaintiff was unreasonably delayed in the completion of the work called for by his contract for a period of 3½ months, as a result of which he incurred and paid the following increased costs in excess of the costs included in the contract price and in excess of the costs which he would otherwise have incurred except for such delay:

73

Salaries of supervisory and clerical forces and expenses at Roanoke for 3½ months	$11,344.40
Overhead expenses at Montgomery office for 3½ months	18,033.52
Liability and compensation insurance	4,661.07
Heating cost	4,124.73
Field expenses, resulting from delay in furnishing Boiler House information	200.89
Cost of grading, roads and walks	12,734.91
Total	51,249.52

1,. Claim for $25,886.84, representing (1) increased cost of material and labor for outside scaffolds, $10,466.88; (2) extra labor cost

for brick masons, $12,990; and (3) loss from unreasonable inspection, $2,429.96.—The face brick specified for the buildings covered by plaintiff's contract and approved by defendant was so manufactured as to have the appearance of hand-made brick. They varied as much as one-half inch in length and they also varied in width to such an extent as made it impossible to keep the vertical mortar line or joints absolutely uniform in width or to keep such mortar line to within a variance of ⅛ of an inch. The contract called for mortar joints "approximately ½ inch thick," and stated that "the joints shall be of practically uniform width throughout." The type of brick was not specified. The kind and type of brick to be used were decided upon after the contract was made. With regard to windows the contract provided only "that the brick and joints on each side of the center line of each opening, etc., shall be similar." The long side of the brick when laid with the wide side face down was called a "stretcher." When the end of the brick was exposed in the wall, this was called a "header." Each horizontal row of brick is known as a "course." The brick arrangement specified for the buildings covered by plaintiff's contract, known as Flemish Bond, consisted of alternate headers and stretchers in each course, with the header in one course centering over the stretcher in the next course below.

The brickwork under plaintiff's contract is covered by specifications 5C, pages 1 and 2. Paragraph 4 of these specifications, so far as material here, is as follows:

"Brickwork shall be built plumb and to a line. Bricks shall
74 be laid in a full bed of cement mortar with shoved joints and each course completely flushed with mortar. All vertical and horizontal joints shall be completely filled with mortar and all brick facing heavily pargeted on the back side with cement lime mortar wherever cinder blocks are to be used for backing up of exterior walls and the dampproofing and plaster finish omitted from the face of the walls on the room side. The outside face of all brickwork used in connection with cinder backup blocks with dampproofing and plaster omitted from the inside face of the wall shall be given two heavy coats of an approved colorless dampproofing as elsewhere specified. Facing brick for the Administration Building, Main Building, Dining Hall, and Attendants' Quarters Building, Recreation Building, Acute Building, Colored Patients' Building, Connecting Corridors, Nurses' Quarters, Manager's Residence, and Officers' Duplex Quarters shall be laid in Flemish Bond with "Homewood" joints made by running a tool along the joints against a straight edge to form a fine idented line in the center of the mortar joint. *Joints shall be approximately ½-inch thick*, except that brick arches shall have joints approximately ⅛-inch thick. Facing brick for all other buildings shall be in common bond laid with weathered *joints approximately ½-inch thick*, except as otherwise indicated, and with header course giving through bond at every sixth course. Mortar for facing brick shall

have added to it a pure mineral pigment to produce an approved light tan or buff color which will harmonize with the color of the brickwork.

Through bonding shall be provided in typical walls as shown by detail. Where through bonding is not possible, the brick shall be bonded to the masonry walls, columns, etc., by approved metal ties. The bond of all facing brick shall be maintained plumb and *the joints shall be of practically uniform width throughout.* Exterior brickwork shall be laid out with uniformity regarding openings and breaks in walls so that the *brick and joints on each side of the center line of each opening, etc., shall be similiar.* (Italics supplied.)

Under such specifications and in brick construction work of the kind involved in this case, especially where the bricks vary in length and width, it is reasonable, usual and customary in the construction industry to permit and allow a variance or tolerance of from 1/8 to 1/4 inch or a maximum of 1/4 inch where necessary. A
75 variation of slightly more than 1/8 inch in some instances, and in others a variation or tolerance of almost 1/4 inch was absolutely necessary in this case in order to keep the mortar joints throughout "of practically uniform width" and the brick and mortar joints on each side of the center line of each opening similar. A tolerance between 1/8 and 1/4 inch insisted upon by plaintiff was clearly within the specification terms "approximately 1/2 inch thick." "practically uniform," and "similar." The requirements and exactions of defendant's authorized officers and agents of a maximum of 1/8 inch or less variance as to all mortar joints and a maximum of 1/4 inch variance at the center and on each side of the center line of windows or openings were unauthorized, arbitrary, capricious and so grossly erroneous as to imply bad faith.

In estimating the cost of the brickwork called for by the specifications for the buildings to be constructed, and in preparing his bid therefor, plaintiff planned to lay the brick by the over-hand method, which is a recognized and accepted method of doing such work, especially on buildings of the type and size here involved, under which method the brick masons work from the inside of the building except where outside bracket-scaffolds, or cantilever-scaffolds, are needed and used at each floor to lay the brick against the outside face of concrete spandrel beams. This was the customary and acceptable way of laying such brick in the construction of buildings such as those covered by plaintiff's contract. Plaintiff had previously employed this method on similar government buildings without objection and with full approval and such over-hand method of laying brick was employed by plaintiff in the construction of a large hospital facility for the Veterans' Administration which had been completed without objection shortly prior to the beginning of work on the Roanoke facility under the present contract. The contracting officer and his authorized representative, the supervising superintendent of construction on the prior hospital facility buildings were the same persons who

were the contracting officer and supervising superintendent of construction under plaintiff's contract for the construction of the Veterans' Administration hospital facility at Roanoke. Under
76 plaintiff's prior contract the supervising superintendent of construction approved the method of laying bricks from inside of the building. When plaintiff commenced the brickwork under the contract in suit the supervising superintendent of construction and his assistant orally directed and ordered plaintiff to build outside scaffolds for all buildings, and required the brick masons to work from the outside of the buildings in laying the brick. Plaintiff protested being required to do this to the supervising superintendent of construction and to the contracting officer insisting that his contract did not require him to employ that method and incur that expense, and asked for a written order therefor which was refused. In reply to this protest, the supervising superintendent of construction replied that, while he could not order or require the plaintiff to construct such outside scaffolds around the buildings, he could and would make plaintiff sorry if he did not do so or make him wish he had. There was no provision in the contract or specifications which required plaintiff to construct outside scaffolds and lay the brick entirely from the outside of the buildings.

Plaintiff proceeded for the time being to allow his brick masons to lay the brick from the inside. By so doing the brick masons could keep the brick and mortar joints more uniform and similar than could be done by laying the brick from outside scaffolds. Thereupon, and solely for the purpose of forcing plaintiff to construct outside scaffolds around all buildings, the defendant's supervising superintendent of construction, as the authorized representative of the contracting officer, and his assistant, who was the superintendent of construction and inspector, required of plaintiff that a header brick must come exactly and precisely under the center line of each window or opening; that such brickwork under and around all other windows in that wall and all windows on opposite sides of all buildings and in opposite wings of each building must be precisely uniform to a maximum of $\frac{1}{16}$ of an inch by measurement. A variance of more than $\frac{1}{16}$ inch could not be detected without measurement. In addition, and for the same reason, the defendant's supervising superintendent of construc-
tion required and exacted of plaintiff mortar joints throughout
77 the buildings that did not vary more than $\frac{1}{8}$ inch by measurement. Brickwork not meeting these exact requirements was rejected. Plaintiff was told that he could not lay brickwork that would be acceptable unless he used outside scaffolds. These exactions and requirements were unauthorized, arbitrary, capricious and so grossly erroneous as to imply bad faith.

Thereupon the plaintiff being confronted with a situation and with requirements which it was impossible to meet and overcome, proceeded to purchase the lumber and other materials necessary for, and to build, necessary outside scaffolds around the buildings and performed all of

the brickwork from such outside scaffolds. When this scaffold controversy was going on plaintiff was being delayed by reason of no mechanical work being done. The construction and use of outside scaffolds seriously delayed plaintiff's progress and made the brickwork much more expensive than it otherwise would have been. All brickwork could have been performed better, more nearly in accordance with the specifications, and at much less expenses by the customary and accepted overhand or inside method which plaintiff in making his bid planned to use.

As soon as plaintiff began constructing and using outside scaffolds, the defendant no longer exacted the precise requirements as to exact accuracy in centering header brick in windows and in the mortar joints but permitted without further objection the usual and customary variance or tolerance.

As a result of the aforementioned unreasonable requirements, plaintiff's costs of performance were increased $25,886.84, which is made up of $10,466.88, actual cost of material and labor for scaffolds; $12,990, extra labor costs for brick masons, and $2,429.96, actual loss from increased wages due to delays by reason of the unreasonable inspection requirements as to laying brick prior to the construction of the outside scaffolds.

16. Claim for $9,033.21 extra expenses due to arbitrary and unauthorized rulings by the supervising superintendent of construction and his assistant, is made up of (a) $4,952.95 actual salaries and expenses of two extra representatives which under the circumstances it was
78 necessary for plaintiff to station at Roanoke solely to handle protests, etc., with the defendant's officers in charge of the work and directly with the contracting officer in Washington; (b) $2,620.66 actual cost of unnecessarily bolting metal concrete form pans with three bolts at the overlap; (c) $1,352.10 actual cost of performing certain fine grading work in the basements of certain buildings a second time, and (d) $107.50 actual extra cost of temperature steel improperly required by supervising superintendent of construction where two-way reinforcing steel was used.

(a) The proof shows that in a great many instances of inspection and instruction during performance of work under plaintiff's contract, defendant's supervising superintendent of construction and his assistant superintendent-inspector were unreasonably meticulous and overexacting and positively showed a lack of reasonable and proper cooperation as a whole throughout the performance of the contract. Plaintiff and his officers and employees at all times acted reasonably and properly and were not guilty of any acts or conduct that justified the unreasonable acts and conduct of defendant's officers. The circumstances and conditions encountered by plaintiff throughout the performance of his contract by reason of the acts and conduct of defendant's officers in charge of the work were other than he had any cause to expect on a job of the type and character covered by his contract.

Immediately after plaintiff began work under the contract defendant's officers in charge of the work at the site thereof began, without

any justification, to act in an unreasonable, arbitrary, unauthorized and unfair way toward plaintiff, and continued so to act throughout the performance of the contract. They constantly and without plaintiff's knowledge made false, misleading and unfair reports to their superiors concerning plaintiff and his work. On numerous occasions they required plaintiff to do things admittedly not required of him under the contract on threat of reprisals for refusal. On occasions defendant's agents would capriciously and without reason reverse their instructions and directions after plaintiff had proceeded to comply with the first instructions. In the course of their work defend-
79 ant's agents in immediate charge of the work unreasonably and unnecessarily engaged in harsh, profane, and abusive language to plaintiff's officers and employees thereby unreasonably interfering with and disorganizing the work. Defendant's officers at the site of the work resented being reversed by the contracting officer's office in their instructions and orders and refused when requested to give plaintiff written orders; they resented plaintiff's making protest to the contracting officer, thereby rendering it impossible for plaintiff effectively to protest in writing in each instance to the contracting officer through the defendant's officer at the site of the work. Plaintiff never failed with respect to any of the claims here involved to timely and fully protest to the supervising superintendent of construction and personally to the contracting officer. The contracting officer was fully advised by plaintiff of the reasons and necessity of oral protests and conferences on and with respect to the acts, conduct, rulings and requirements of the defendant's officers at the site of the work. With full knowledge and understanding of the circumstances and conditions, the contracting officer acquiesced in the procedure followed by plaintiff, and at no time requested or directed plaintiff to submit his protests in writing.

The contracting officer never failed to consider plaintiff's protests but as to many of them made no definite decision thereon by reason of the circumstances which gave rise thereto. The contracting officer in those cases involving unreasonable and arbitrary acts and instructions of the officers at the site of the work stated to plaintiff that he understood and appreciated the troubles and difficulties under which plaintiff was having to perform the work, but there was practically nothing he could do about it and that plaintiff should keep him informed but that plaintiff "would just have to do the best he could to get along" with the officers and inspectors at the site of the work, to the end that the work be completed as soon as possible. Cordial relations did not exist between defendant's officers at the site of the work and the contracting officer's office.

As a result and by reason of the unreasonable attitude and acts of defendant's officers at the site of the work it was impossible
80 for plaintiff's superintendent of construction to handle the matter of protests and appeals to the contracting officer and it was necessary and plaintiff did incur and pay $4,952.95 for salaries and expenses, including travel expense of two extra representa-

tives at Roanoke to handle protests to and hold conferences with the defendant's officers and the contracting officer. This expense was in excess of the costs included in the contract price and in excess of the costs which plaintiff would have incurred except for the unreasonable, unauthorized, and arbitrary acts of defendant's officers.

Instead of having an inspector constantly available to inspect plaintiff's work as it progressed and although requiring that each step in the work be inspected before the next step was taken by plaintiff, the defendant's agents in immediate charge of the work required of plaintiff that he give them at least two hours written notice before they or either of them would make inspections. This had the effect of unnecessarily delaying the progress of the work and rendered it more expensive than it would otherwise have been. Defendant had only one inspector on the entire construction portion of the work and he spent most of his time in defendant's field office. The proof as a whole requires the finding that defendant's officers at the site of the work realized and knew that plaintiff was being seriously delayed by failure of defendant to have the necessary mechanical work performed so that plaintiff could proceed without unreasonable interruption, and for that reason in part entered upon a course of conduct intended to make it appear that plaintiff was not ready for the mechanical work installations and that plaintiff himself was delaying the work. Notwithstanding this the plaintiff had the roof on some of the buildings before the mechanical contractor's contract was terminated and such work gotten under way.

(b) Metal pans about three feet long and twenty inches wide were required to be and were used for concrete forms, supported by wood forms, for laying concrete floor slabs. All floors were of concrete beam slab construction. There were 241,896 square feet of metal concrete form pans. During the period prior to the date on which the mechanical contractor abandoned his contract and the termination thereof, defendant's superintendent of construc-
81 tion ordered and required plaintiff to bolt these pans together where the ends overlapped with three bolts at each overlap. Plaintiff timely and properly protested this action but nothing was done about it for the reason hereinbefore stated. The pans overlapped from 2½ to 6 inches. The bolting of the pans was not required by the contract, was unnecessary and was contrary to the usual and customary practice in the construction industry. The metal pans were in good condition. They had been put in good condition by the manufacturer before they were used on this job. They did not at any time allow any unusual leakage of cement. A slight leakage of water in the concrete unavoidably occurs as the concrete is first being poured onto the forms and before the weight thereof seals the overlaps as it always does and did in this instance. The metal pans were not out of shape, bent or warped. The requirement that the pans be bolted was unreasonable, arbitrary and so grossly erroneous as to imply bad faith. After the mechanical contract had been cancelled and relet and after the mechanical work

got under way by the new mechanical contractor so that the necessary mechanical work in connection with the concrete floor slabs was being performed, the defendant's superintendent of construction no longer required plaintiff to bolt the metal form pans, although the same pans were thereafter used and were, if anything, not in as good condition as before, but they did not allow undue leakage at any time.

The actual increased and extra cost for labor and material by reason of the bolting requirement was $2,620.66.

(c) Plaintiff's contract required that he perform the work of fine or finished grading in the basement of certain buildings preparatory to laying the concrete basement floor slabs. Plaintiff could not lay these basement floor slabs until the mechanical contractor had dug his trenches in the basements, laid his necessary pipes and backfilled and tamped the soil over such pipes. In such cases it is the reasonable and customary practice for the constructing contractor to wait until the mechanical contractor has performed his work of laying pipes and backfilling and tamping before doing the fine or finished grading preparatory to laying the concrete basement slabs. The defendant's
82 superintendent of construction directed and required plaintiff to do the fine or finished grading work before the mechanical contractor had performed the work of laying pipes under the basements required under his contract. Plaintiff duly protested and did this work as directed and, after the mechanical contractor had dug his trenches, laid his pipes and made his backfills over them, plaintiff was required to do certain of his final finished grading work in certain basements a second time at an increased cost of $1,352.10 over what such grading would have cost if he had been permitted to wait until after the mechanical contractor had finished the work required of him, as above mentioned.

This requirement was arbitrary, unreasonable, and so grossly erroneous as to imply bad faith.

(d) April 19, 1934 defendant's superintendent of construction directed and required plaintiff to place temperature reinforcing steel or nonshrinkage steel rods in the two-way reinforced concrete slabs of the first floor of building fifteen. He took the position that temperature steel reinforcing rods must be used in all solid slabs without distinction as to whether the slabs were reinforced with one-way or two-way rods. Plaintiff protested and made claim for $107.50 for the actual extra cost of the temperature steel furnished and placed as directed. The contracting officer reversed the superintendent of construction but plaintiff was not paid the extra cost of $107.50.

17. Claim for $8,657.05 excess and extra costs resulting from defendant's ruling on classification of and wage scale for reinforcing rodmen.—The amount of $4,365.12 of this claim represents the difference of 50 cents an hour between the minimum of $1.10 per hour which defendant required plaintiff to pay all semiskilled employees who engaged in work of placing or tying reinforcing rods, and the minimum

of 60 cents per hour customarily paid in the construction industry for such work which was recognized and classified in the industry and by labor unions as semiskilled labor calling for an intermediate wage rate between the minimum wage rates for skilled and unskilled labor. The balance of this claim of $4,291.93 represents the actual excess costs and expenses resulting from delay and direct and improper
83 interference with the reinforcing steel work by defendant's supervisory officers and agents.

Plaintiff's contract work was financed and paid for from Public Works Administration funds. Plaintiff's contract was Form No. 51 prescribed by the Federal Emergency Administration of Public Works.

Article 18 of the contract reads as follows:

"ART. 18. Wages.—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

"Skilled labor, $1.10.

"Unskilled labor, $0.45.

"(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on accounts of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

"(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: Provided, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

"(d) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as 'unskilled laborers.'
84 "(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works, acting on such recommendation, establishes different minimum wage

rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

"(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties."

Plaintiff, while preparing his bid, wrote a letter on September 4, 1933, to the Secretary of the Interior, addressing his letter to the Federal Emergency Administration of Public Works, as follows:

"A copy of Release No. 56 of the Federal Emergency Administration of Public Works has just come to our attention, this having reference to rates of wage for construction work financed from funds appropriated by the Administrator of Public Works under the authority of the National Industrial Recovery Act.

"It seems to us that the wording of this Release is such as to necessitate a number of explanatory interpretations, and I beg of you to issue such interpretations as quickly as possible in order that we may know how to estimate work coming under this head.

"In Paragraph I of the Release, minimum wages are stated for 'Skilled Labor' and 'Unskilled Labor.' Is there no intermediate ground between these two classifications? And should not other scales be set for such intermediate classes? What constitutes a skilled laborer? Does not this fixing of the scales for the two extremes only leave open a vast field for controversy which will in some cases work an undue hardship on labor itself and in other cases work an undue hardship on employers?

"In this connection, Paragraph IV seems to be particularly in need of some explanation. It is stated that assistants, helpers, apprentices, and serving laborers, who work with and serve skilled journeymen are not to be termed as 'unskilled laborers.' The wage promul-
85 gated is for two classifications only. If a man does not come in the 'unskilled laborer' class, then does he necessarily come in the skilled labor class? Does this mean that the laborer who carries lumber to a carpenter and otherwise waits on the carpenter is to receive the same pay as the carpenter? Does the man who wheels a barrow of brick to the brickmasons become more than twice as valuable as the man who wheels cement or sand or gravel to the concrete mixer simply because in doing so he is serving a skilled workman? If under this heading he does not become entitled to the pay of a 'skilled laborer,' then what pay should he receive?

"Under the 'prevailing wage scale' law the Government declined to predetermine the wage scale, leaving the contractor to investigate in each locality and decide for himself what constituted the 'prevailing scale' in that community. Immediately after the award of a contract a dispute would be declared to exist and the Department of Labor would determine and fix the wage scale which might vary so tremendously from the scale which had been found by the contractor

as to cause said contractor a tremendous financial loss on the contract and, in fact, in many cases to cause the contractor to become a bankrupt.

"We have been hoping and praying for a predetermination of the wage scale but we do feel that this should be a more complete and specific determination, including all classifications, and so clearly worded or interpreted as to leave no room for controversies as to its meaning."

September 11, 1933, the Administrator by the Deputy Administrator, Federal Emergency Administration of Public Works, wrote plaintiff as follows:

"This will acknowledge your letter of September 4, addressed to Hon. Harold L. Ickes, raising certain questions in connection with Public Works Administration Release No. 56.

"It is anticipated that there will be certain semiskilled workers who will receive wages less than the rate for skilled workers mentioned. For example, carpenters' helpers would be in such an intermediate grade. The Public Works Administration has not predetermined the wage rate for such intermediate grades. The wage rate set for skilled workers takes into consideration the very restricted working week of 30 hours provided by law.

"In setting the wage rate for any intermediate grades this
86 same factor should be taken into consideration. It is, of course, provided that carpenters' helpers, etc., should not be classed as common labor."

October 11, 1933, the Deputy Administrator of the Federal Emergency Administration of Public Works wrote a letter to "All State Engineers and Members of State Advisory Boards," suggesting, among other things, a joint conference of representatives of contractors, labor, and borrowers of public funds. This letter was as follows:

"The question of wage rates for intermediate grades of workers has presented difficulties.

"Quite a few of our State Engineers have endeavored to assist contractors and labor to come to an agreement among themselves on these rates. It is my desire that as much weight as possible be given local customs and usages in this connection, keeping in mind the minimum rates indicated by our regulations for the skilled and unskilled grades, and the 30-hour week.

"Several of our State Engineers and State Advisory Boards have approached the problem in what seems to me the proper manner. For example, in North Dakota a meeting of some ten or more representatives of the contractors' associations and some twenty-five representatives of organized labor in the State was called by the Advisory Board, and the State Engineer. At this meeting committees of labor representatives and contractors worked out mutually acceptable wage rates for intermediate grades of workers in each of the trades. A few specific cases on which agreement was not reached were referred to the State Advisory Board, acting as arbitrator. Finally a complete scale of minimum intermediate wages was drawn up which had the approval of the entire meeting. This was published in the form of a

statement on the joint responsibility of the contracting and labor organizations. I would suggest the addition to the meeting of a few representatives of actual or potential borrowers such as city or State engineering officials and other prominent borrowers concerned with the award of contracts.

"The resulting schedule of minimum wages should not be published as on the authority of the State Engineer, but by authority of the representative groups themselves. It is a schedule of wage rates to meet the minimum condition of the PWA regulations. The clause providing that where collective agreements provide higher wages such higher wages shall prevail should be inserted. The ques-
87 tion of the exact territory in which collective bargaining agreements are to be considered in force is another matter. This, the Department of Labor decides.

"Such a schedule cannot be considered absolutely binding. In case of a protest by labor on a contract being done under this agreement the matter will be referred to the Board of Labor Review. I have no doubt, however, that when such a schedule is agreed upon by truly representative groups, it will be given great weight by the Board of Labor Review in considering any protests.

"Such arrangements will go far to stabilize the labor situation, and I want to encourage all State Engineers and Advisory Boards to encourage responsible local groups to agree upon intermediate wage rates."

The Virginia Public Works Advisory Board requested the Governor of Virginia to call a State labor conference, which he did, the conference being held in Richmond, October 27, 1933. It met for the purpose of agreeing upon a schedule of wage rates for intermediate laborers. The Governor appointed a committee composed of representatives of contractors, labor, and borrowers of public funds. They agreed on a schedule of wage rates for intermediate labor, and the schedule so agreed upon is in evidence as Exhibit 91–B and is made a part hereof by reference. When plaintiff was awarded the contract in suit he was furnished, upon request, a copy of that schedule of intermediate wage rates and the schedule so furnished is in evidence as Exhibit 91 and is made a part hereof by reference. The schedule set forth the following hourly wage rates, among others:

"(1) Skilled Mechanics at rate of $1.10 per hour:

* * * * * * *

"Carpenters—interior work, hanging doors, setting windows, trim mill, flooring, and framing work. * * *

"(2) Carpenters on Rough Work at rate of 80¢ per hour.

"(3) Apprentices, Helpers, or certain Unskilled Laborers at 60¢ per hour."

No specific provision other than as noted above was made in the schedule with reference to wage rates for laborers or employees performing work usually and customarily recognized and classified by

the construction industry and labor as semiskilled, such as
88 placing ordinary reinforcing steel rods, terrazzo grinding machine operators, etc., under the supervision of competent and experienced men. No specific provision was made in the schedule as to the wage rate for semiskilled reinforcing rodmen, other than as covered by item (3) above at a minimum of 60 cents per hour.

Plaintiff's contract, P. W. A. Bulletin 51, the Virginia Conference Schedule and P. W. A. Release 56, contemplated and recognized the classification and use by plaintiff of labor on various classes of work which had been and were then usually and customarily regarded and classified as semiskilled by the construction industry and labor and that for such classified labor he would pay a reasonable minimum hourly rate of wage between the minimum fixed in the contract for skilled labor and the minimum so fixed for unskilled or common labor. Prior to and during the performance of plaintiff's contract and subsequently the construction industry and labor as well as the government under other P. W. A. 51 contracts recognized, treated and classified the work of placing and tying reinforcing rods as semiskilled work permitting and calling for the payment of the prevailing intermediate rate of wage, and permitting the use of semiskilled workers on such work. On March 9, 1935, twenty-three days after plaintiff's contract had been completed, the Federal Emergency Administration of Public Works under P. W. A. contracts classified "Reinforcing Steel Work" as "semiskilled" labor, calling for the payment of an "Intermediate Grade-Minimum" hourly wage rate of 60 cents per hour. This was in accordance with custom and practice of industry and labor and strictly in accordance with plaintiff's course of action and insistence during the performance of his contract.

Plaintiff computed his bid price on the basis that reinforcing steel work would be classified as semiskilled labor at a minimum wage rate of 60 cents per hour and he paid that minimum at all times until he was compelled and required to pay $1.10 per hour retroactively as hereinafter set forth. Plaintiff did not at any time violate the wage or hours provisions of his contract with defendant.

Before plaintiff commenced work under his contract he pre-
89 pared, posted and submitted to defendant his schedule of classifications of work and hourly wage scale in each classification. This schedule, among other classifications, classified reinforcing steel work as semiskilled at an intermediate wage rate of 60 cents per hour. At that time defendant's supervising superintendent of construction as the authorized representative of the contracting officer approved the schedule and plaintiff began operating thereunder, and continued to do so without objection from any source until some time in March 1934. The only tools used by men working on placing reinforcing steel rods are wire pliers and sometimes steel cutters. These men worked under the direct supervision and instructions of experienced and capable foremen, who had had many years of experience in reinforcing steel work.

Article 19 (b) of plaintiff's contract provided as follows:

"To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: * * *"

The plaintiff fully complied with this provision. The government employment office at Roanoke from which plaintiff obtained his labor was not able to supply plaintiff with a sufficient number of men who were experienced in placing reinforcing steel rods. Plaintiff took this matter up with defendant's supervising superintendent of construction in the early stage of the work and by agreement with defendant's supervising superintendent the plaintiff began using the more intelligent and experienced laborers supplied for this work in laying and reinforcing steel rods under the direct supervision and instruction of other experienced workmen and foremen of long experience. Plaintiff with the consent and approval of defendant paid these semi-skilled men an intermediate wage rate of 60 cents per hour. These men were properly instructed and their work was at all times properly supervised. The reinforcing steel work which they did was properly and correctly performed at all times. About March 10, 1934, defendant's supervising superintendent took the position that reinforcing steel work was "skilled labor" on the sole ground that the contract recognized and provided for only two classifications of labor, namely, "skilled labor" and "unskilled labor" or common labor. Accordingly he told plaintiff that all of this type of work constituted skilled labor for which plaintiff must pay all employees having anything to do with bending, cutting, placing, or tying reinforcing steel rods the skilled labor rate of $1.10 per hour under Article 18 of the contract. No objection was made that the men engaged on the work were not properly performing it, but that plaintiff would have to obtain and use thereon skilled and experienced reinforcing rodmen. Plaintiff properly protested to the defendant's superintendent of construction and to the contracting officer direct. Plaintiff's protest fully stated to defendant that, while he was willing to use only men who were experienced as reinforcing rodmen if defendant insisted and if defendant through its employment office could supply them, reinforcing steel work did not come within the "skilled labor" classification but came within the "semiskilled" classification at an intermediate wage rate as contemplated and recognized by the contract, and as had been, and was then recognized by the construction industry and labor. Plaintiff did not at any time have any issue or controversy with his laborers or with any labor union. The controversy raised by defendant's superintendent involved only an interpretation of the contract and did not have it in any issue or controversy with labor.

March 15, 1934, defendant's superintendent of construction wrote a letter addressed to the "U. S. Department of Labor, Washington, D. C." as follows:

"Your interpretation is requested as to whether concrete reinforcing steel rodmen, who fabricate and place reinforcing steel in forms, are considered skilled workmen.

"As this project is financed by P. W. A. funds, and *there being only two scales, skilled and unskilled labor, this office is unable to determine in which class the reinforcing steel rodmen should be placed.* [Italics supplied.]

"Your interpretation is requested at the earliest possible date as this class of work is now being started on this project."

91 March 20, 1934, the superintendent of construction also wrote the contracting officer as follows:

"It is requested that you contact the Department of Labor and have one of their representatives report to this station for the purpose of making a survey of the scale of wages paid by the contractor and various subcontractors for executing work on the Veterans Administration Facilities, at Roanoke, Virginia.

"There is a constant argument between this office and the contractor as to the interpretation of the scale of wages paid unskilled and semiskilled employes.

"Your immediate action will be appreciated."

Plaintiff was paying the prevailing intermediate wage rate for reinforcing steel work. That was not the issue raised by defendant and the Department of Labor had no jurisdiction of the question.

The contracting officer made no independent decision on the question raised by the supervising superintendent. Plaintiff was not furnished with copies of the above quoted letters of March 15 and 20. The defendant's supervising superintendent erroneously and incorrectly stated the question which was in controversy in his letters of March 15 and 20. In his submissions he decided the whole controversy and asked for a ruling on something that was not in issue. There was no controversy about the fact that if ordinary reinforcing steel work was a "skilled labor" classification reinforcing steel workers would come within it. The actual controversy was "does the contract contemplate and recognize the customary and recognized semiskilled or intermediate grade of labor at a minimum hourly rate of wage between the minimum of $1.10 per hour specified for 'skilled labor' and the minimum of 45 cents per hour for unskilled or common labor." The defendant's supervising superintendent recognized and admitted that in contracts between individuals and on state projects other than government contracts it was the usual, customary, and recognized practice of labor and industry to classify, use, and pay for reinforcing steel work as semiskilled labor at an intermediate rate of wage. The sole basis of his ruling and order to plaintiff was that this contract contem-

92 plated, recognized and provided for, only two labor classifications and that all labor which did not clearly fall into the unskilled or common labor classification must be classified and paid as skilled labor at $1.10 per hour.

The Department of Labor did not rule on the question as stated by defendant's supervising superintendent.

March 20, 1934, C. D. Hollenbeck, Administrative Assistant for the Veterans Placement Service in the Department of Labor at Washington wrote defendant's superintendent of construction at Roanoke in reply to his letter of March 15 above quoted, as follows:

"In compliance with your request dated March fifteenth as to interpretation of concrete reinforcing steel rodmen, the following is the determination of the Public Works Administration:

"'That men classified as steel rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen,

"'The carrying of steel material to the rodmen can and is usually done by unskilled labor.'

"I trust that this information will be satisfactory."

Defendant did not know, and the record does not show, who, in the Public Works Administration, furnished Hollenbeck with the information which he transmitted to defendant's superintendent. Neither the Department of Labor nor the Public Works Administration ever made a ruling or decision on the real controversy. The statement furnished defendant's officers and by them read to plaintiff was correct on the basis of the erroneous submission but was arbitrary and grossly erroneous if applied to the real and true controversy. After the receipt by defendant of Hollenbeck's letter of March 20, plaintiff had a conference and hearing before the contracting officer and solely on the basis of Hollenbeck's letter he refused to reverse the orders and instructions of the supervising superintendent. The contracting officer made no written ruling or independent decision on the question. The action of the contracting officer in upholding the instruction of the supervising superintendent to plaintiff requiring plaintiff to classify and pay reinforcing steel workers as skilled labor at a minimum of $1.10 per hour was unauthorized, arbitrary and so grossly erroneous as to imply bad faith.

93 March 22, 1934, defendant's supervising superintendent wrote plaintiff as follows:

"Wish to advise that the U. S. Department of Labor, United States Employment Service, has notified this office as follows:

"'That men classified as steel rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen.

"'The carrying of steel material to the rodmen can and is usually done by unskilled labor.'

"It is requested that you take immediate steps in this connection."

On the same day the superintendent of construction further wrote plaintiff as follows:

"Further reference is made to the writer's letter of March 22, 1934, in connection with using classified steel rodmen on reinforcing work at Veterans' Administration Hospital at Roanoke, Virginia.

"In this connection it is evident that you have not complied with your contract Form P. W. A. 51, Article 18. Therefore it will be necessary for you to pay these skilled laborers, as interpreted by the Department of Labor, their back salaries for all time these men were doing classified work.

"This matter will be checked from your pay rolls."

In reply plaintiff wrote the superintendent of construction March 24, 1934, as follows:

"Reference to my contract for construction of Veterans' Facility at Roanoke, Virginia, and particularly your letters of March 22, 1934, advising me that you have been notified by the U. S. Department of Labor that men classified as steel rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen.

"Your second letter of March 22d advises that it will be necessary for me to pay the men whom I have tying reinforcing steel mats the rate for skilled labor and to make this payment retroactive.

"The men I had were not experienced reinforcing rodmen and were not sufficiently adapted to this kind of work to warrant my continuing their services as reinforcing steel rodmen.

"The Virginia State Employment Bureau, through whom workmen have been furnished me in accordance with Article 19, Section
94 B, of the contract, were requested verbally when the tying of reinforcing steel was started on this operation to furnish me with men experienced in this line of work. This they admitted they could not do and stated so far as they knew there were none available in this vicinity, and it was agreed to use men who would properly come under the classification as set forth in Section D of Article 18 of the contract to do this work.

"Since it has been ruled that I will have to pay the skilled-labor rate for this class of work, I want to go on record by stating that I have requested the Virginia State Employment Bureau to furnish me on Monday morning, March 26th, with at least four men who are experienced in tying reinforcing steel, and additional reinforce [reinforcing] rodmen as needed, and if they cannot do this, I will be compelled to seek these men from other sections.

"In your letter of March 23rd, relative to this matter, you list certain men and give the number of hours which their time is to be adjusted.

"Under this list you showed Neil Clark as being paid 213 hours at 50c. During the time Neil Clark was engaged in these number of hours he was used as a rodman with the engineering crew, and while he is shown as a rodman on the certified pay rolls, he did not have anything to do with the reinforcing steel while engaged in these 213 hours. Incidentally, he was the most adept man for this work that I had, although prior to tying steel on this job he had had no experience.

"In your letter you also list John Collins four hours at 45c per hour. This is evidently the time shown on pay roll for week ending Feb

ruary 22, and while Collins's name appears immediately under the Rodmen, he is a laborer and you will note that his classification was omitted from this pay roll. If you will refer to pay rolls other than the one for week ending February 22d, you will find Collins listed as a laborer."

The statements made in plaintiff's letter were true and correct.

In reply to this letter the superintendent of construction wrote plaintiff on March 26, 1934, as follows:

"Reference is made to your letter under date of March 24, 1934, in connection with labor employed on this project as classified steel rodmen (reinforcing), who place, fix, tie, or fabricate steel rods in forms.

"You state in the above-mentioned letter that it was agreed
95 upon between you and the local Employment Service that you would use men who would come under the classification as set forth in Section B, Article 19 of the contract, which pertains to assistants, helpers, and apprentices.

"You are advised that you did violate the contract requirements by working men on this project, paying them the rate of 60¢ per hour, since Contract Form PWA 51, Article 18, sets forth the wage scale as skilled labor $1.10 per hour and unskilled labor 45¢ per hour. Therefore you violated the contract when you used other than skilled labor for performing work which required skilled labor according to the ruling of the U. S. Department of Labor.

"You are directed to reimburse the men whom you employed as rodmen and used as skilled laborers, the difference between the rate actually paid them, 60¢ per hour, and $1.10, for which time these men were actually employed under the skilled labor classification."

The statement made in the third paragraph of the above letter was untrue and arbitrary and the statement in the last paragraph was unauthorized, arbitrary and so grossly erroneous as to imply bad faith.

Plaintiff complied with the action of the contracting officer as hereinbefore mentioned and the above-quoted written directions of the superintendent of construction and thereafter paid all workmen engaged in placing, fixing, tying, or fabricating reinforcing steel rods $1.10 per hour and paid all men who had prior thereto been engaged in such work the difference between 60 cents an hour and $1.10 per hour. The additional cost to plaintiff as a result of paying such workmen $1.10 per hour over what such cost would have been if he had been permitted to pay them 60 cents per hour, was $4,365.12.

At the time plaintiff was required to pay all men engaged on the work of placing steel reinforcing rods $1.10 per hour, he found that some of the men were not sufficiently experienced to justify them being classed as skilled mechanics and it was necessary for him to discharge them. Those who were dismissed took the matter up with the Roanoke representative of the Public Works Administration advising him that they did not claim to be skilled mechanics and were willing

to continue on the work which they had been doing at 60 cents
96 per hour. As a result of this the matter was taken up with Hon. Clifton A. Woodrum, a member of Congress, who on March 31, 1934, communicated with the contracting officer with reference thereto, and on April 25, 1934, the contracting officer wrote Mr. Woodrum as follows:

"Further reference is made to your letter of March 31, 1934, enclosing the attached letter dated March 29, 1934, with accompanying file addressed to you by the Chamber of Commerce at Roanoke, Virginia, advising that in connection with the construction work at Veterans' Administration Facility, Roanoke, Virginia, the contractor laid off certain men engaged in tying reinforcing bars and replaced them with skilled mechanics. This action on the contractor's part resulted from a ruling made by the Public Works Administration that men 'classified as skilled rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen.' Under the terms of the contract the skilled workmen referred to must, to the fullest extent possible, be chosen 'from the list of qualified workers submitted by local employment agencies designated by the United States Employment Service' with a preference to 'bona fide residence of the political subdivision and/or county in which the work is to be performed * * *.'

"It appears that the contractor upon being advised of the decision of the Public Works Administration referred to took action in accordance with the terms of its contract by making application to the Virginia State Employment Bureau for skilled mechanics.

"While I regret that the men who had been engaged in tying reinforcing bars were replaced, I am sure you will appreciate that so long as the contractor strictly complies with the terms of his contract I can take no action in having them reinstated."

This was the only communication or ruling which the contracting officer made with reference to the matter. Neither the Secretary of Labor under paragraph 10, page 3 of specifications 1G, nor the Board of Labor Review under Articles 15 and 18 (f) of the contract considered or made any ruling or decision with reference to any intermediate or semi-skilled labor wage scale during the performance by plaintiff and his subcontractors of the work called for by the contract in suit.

During the progress of plaintiff's contract work defendant's
97 supervising superintendent and his assistant as superintendent and inspector arbitrarily, capriciously, unreasonably and grossly erroneously interfered with and delayed the men engaged on reinforcing steel work and caused an unreasonable amount of idle time of steel crews on the job. The actual excess cost and damage to plaintiff by reason of this unnecessary, unreasonable, arbitrary and unauthorized conduct was $4,291.93.

18. Claim for $26,354.19, alleged excess wages required to be paid to apprentices, helpers, or semiskilled carpenters.—The intermediate grade of semiskilled carpenters or carpenters' helpers is generally recognized by industry and labor and is paid less minimum wage per

hour than skilled carpenters. Members of this group are designated "rough carpenters," "carpenters' assistants," or "semiskilled carpenters." Men working in this intermediate grade are permitted to make plain wooden forms for mass concrete, scaffolds, certain rough work on temporary frame buildings, etc. On this type of work, on open shop or nonunion projects, the Federal Emergency Administration of Public Works recognized and permitted the following ratios of "rough carpenters," "semiskilled carpenters" or "carpenters' assistants" to skilled carpenters:

Type of work	Rough carpenters	Skilled carpenters
1. Finished work, such as millwork, trim, cabinet work, finished wood floors, ceilings, panels, etc.	1	1
2. Forms for unexposed concrete surfaces, and removal of such forms for reuse	4	1
3. Subflooring and sheathing	4	1
4. Scaffolding construction	4	1
5. Framing	4	1

Plaintiff's estimate of the cost of carpentry work on which his bid was made was computed on the basis of the customary and recognized use of rough carpenters, and semiskilled carpenters as apprentices, assistants or helpers to skilled carpenters at a minimum hourly wage rate of from 60 to 65 cents per hour. He accordingly prepared and posted his wage schedule, which at that time was approved. (See finding 17.) Plaintiff paid such employees a minimum of 60 and 65 cents per hour, which was the prevailing rate of wage for
98 such men and for the work which they did as rough carpenters, assistants or helpers in Roanoke and vicinity. This classification in the carpentry trade was recognized by the building industry and labor. Plaintiff's contract contemplated and authorized the use of rough carpenters, helpers and assistants at an intermediate hourly minimum wage rate between that for skilled and unskilled or common labor.

At the same time in March 1934 and for the same reason fully set forth in finding 17 defendant's supervising superintendent told plaintiff he could not pay an intermediate rate of wage to rough carpenters, assistants, apprentices, or helpers, but that all such men must be paid a minimum hourly rate of wage of $1.10 per hour because the contract contemplated and authorized only two rates, one at 45 cents for common labor and the other at $1.10 for skilled labor and that any man who used a tool was a skilled mechanic and must be paid $1.10 per hour. Plaintiff protested to the supervising superintendent and the contracting officer as set forth in finding 17 relating to reinforcing steel work. The requirements concerning carpenters, etc., was a part of the same controversy. Solely on the basis of the submission in the superintendent's letter of March 15 and the reply of Hollenbeck on March 20 (finding 17), the defendant's supervising superintendent gave the above mentioned directions. The contracting officer made no

independent decision or ruling on the matter. There was no controversy concerning the prevailing intermediate wage rate being paid by plaintiff. Plaintiff continued throughout the work to use semiskilled carpenters for rough carpentry work and as assistants and helpers to skilled carpenters but paid them as ordered $1.10 per hour. There was never any issue or controversy between plaintiff and labor as to use of semiskilled carpenters or as to the intermediate wage rates paid them.

The ruling and instruction requiring plaintiff to classify all rough carpenters and helpers and assistants as skilled labor and to pay them the minimum wage rate for skilled mechanics were unauthorized, arbitrary and so grossly erroneous as to imply bad faith.

The difference between the amount which plaintiff was required to pay for all rough carpentry or semiskilled carpentry work and
99 to carpenters' assistants, apprentices, and helpers at $1.10 per hour and the amount which he included in his bid and which he would have paid to men engaged on such work had he been permitted to pay them at the prevailing rates of 60 and 65 cents per hour, was $26,354.19.

19. Claim for $9,730.27, to the use of the Roanoke Marble & Granite Company, Inc., subcontractor, actual excess labor and overhead costs by reason of defendant's refusal to permit plaintiff's subcontractor to employ and use semiskilled laborers as helpers, improvers and terrazzo grinding machine operators at an intermediate minimum wage rate of 60 cents per hour. The Roanoke Marble & Granite Company, Inc., the subcontractor of plaintiff under the plaintiff's contract with defendant, entered into a contract with plaintiff on December 18, 1933, for the furnishing of certain materials and performance of all labor necessary to install and complete the tile, terrazzo, marble and soapstone work called for in plaintiff's contract with the defendant, for the total consideration of $37,703.80. Under this contract the subcontractor estimated that the cost of labor, materials and overhead for the work called for was $35,717.04. In making its bid to plaintiff the subcontractor examined plaintiff's contract and specifications for the construction work called for therein, and P. W. A. Bulletin 51 and other P. W. A. instructions relating to employment of labor, and in making its estimate of labor costs did so in the belief and on the basis that all skilled mechanics would be paid $1.10 per hour; that all unskilled and common laborers would be paid 45 cents per hour and that it might employ intermediate labor at the prevailing wage rate as experienced helpers, improvers or assistants to mechanics, as was the recognized practice and custom in the trade of installing tile, terrazzo, marble, and soapstone work. Accordingly the subcontractor estimated its labor cost at $10,404.75 on that basis, being $8,803.80 for setting tile and laying terrazzo, and $1,600.95 for setting marble and soapstone. The subcontractor's estimate contemplated the use of one helper at 60¢ per hour to assist each skilled mechanic at $1.10 per hour, with the use of sufficient common labor at 45 cents per hour to

handle and move materials and to clean up the finished work.
100 Skilled mechanics were available through the Tile Setters' Union at Roanoke, and experienced helpers and common laborers were available at the United States Reemployment Office.

The subcontractor's contract with plaintiff provided that the subcontractor would comply with all the requirements of plaintiff's contract with the defendant insofar as it related to the work covered by the subcontract.

The general and recognized custom and usage of the tile, terrazzo, marble, and soapstone setting trade were, at all times material to this claim, to employ and use intermediate or semiskilled labor, designated as improvers, assistants, apprentices, or experienced helpers, to serve skilled mechanics in setting tile, marble, soapstone, and laying and grinding terrazzo base and flooring, except intricate grinding and to pay such semiskilled labor an intermediate wage less than the wages paid to skilled mechanics but in excess of the wages paid to common or unskilled labor. Improvers and experienced helpers in this trade are men who are informed as to the different kinds of tile for particular spaces and who are able to select and prepare tile for setting, cut tile to fit spaces, grout the joints and clean the tile after it is set, mix the mortar for tile and terrazzo work, mix the plaster for setting marble and soapstone, drill the holes for and assist marble setters in placing angles and dowel pins. Experienced helpers or improvers were available for use on the subcontractor's job at 60 cents per hour, which was the prevailing rate of wage for that work in the Roanoke district. Common or unskilled labor in such work is used to move materials and clean up after the finished work.

In setting marble and soapstone it is the custom of this trade to use one skilled mechanic to set the tile or lay terrazzo, with one or more experienced helpers or improvers to prepare materials and assist the mechanic, and to use sufficient common labor to move materials. At least one experienced helper or improver is required to serve each skilled mechanic.

The subcontractor began work August 21, 1934, using skilled, semiskilled and common labor, as above indicated, on and after August
101 23, 1934. In the beginning the subcontractor, being a resident of Roanoke, thought that he might for that reason place his own local organization on the work and supplement it through the Virginia Reemployment Service, but found that he could not do so and that he must employ all labor except skilled mechanics through the Virginia Reemployment Service. Accordingly the subcontractor employed helpers through the Reemployment Service.

About September 15, 1934, shortly after the subcontractor began substantial production, defendant's supervising superintendent of construction, solely on the basis of the submission and ruling relating to reinforcing steel workmen and carpenters' helpers and assistants, told and directed the subcontractor and plaintiff that only two classes of labor would be permitted to be employed on the work, namely, skilled mechanics at $1.10 per hour and common labor at 45 cents per hour;

that there was no intermediate wage scale for that or any class of work being performed by the subcontractor under plaintiff's contract; that helpers, improvers, apprentices, and semiskilled laborers who used tools could not be employed unless they were paid the mechanic's wage of $1.10 per hour and that any person who used a tool must be classified as a skilled mechanic and paid a minimum wage of $1.10 per hour. Both plaintiff and the subcontractor protested to defendant's supervising superintendent and to the contracting officer, but complied with the instruction and order given and continued the work to completion thereunder, before the contracting officer reversed the ruling and order of the supervising superintendent and sustained the contention of the subcontractor and plaintiff, as hereinafter mentioned.

Plaintiff's subcontractor paid the men engaged on the work above mentioned $1.10 per hour but it was necessary for him to increase the number of common laborers at 45 cents per hour to wait upon or "help" these men after they were classified as "skilled mechanics," but none of these common laborers did any semiskilled work in the intermediate classification of helpers, improvers, apprentices, or semiskilled laborers.

By reason of plaintiff's being prevented from employing and using improvers and experienced helpers the efficiency of the mechanics
102 was impaired, in that it was necessary for them to cut their own tile, mix their own mortar and plaster, drill holes in marble, and perform all servicing work normally performed by more experienced helpers. As a result the labor of the skilled mechanics in setting the tile was increased and all labor costs were increased over the costs which had been estimated and which would otherwise have been necessary. The work was delayed and the production of work per day was reduced from an average of 150 feet to 100 feet per day; the labor costs per unit were increased for both skilled mechanics and common labor by reason of the decrease in progress and the additional time it required to complete the work.

December 6, 1934, the supervising superintendent ordered plaintiff and the subcontractor to make retroactive payment of $1.10 per hour. This was done.

December 7, 1934, the subcontractor made written protest to plaintiff of this written ruling of the superintendent of construction and submitted letters from other tile and terrazzo contractors and statements from skilled mechanics that it was the custom of the trade to employ grinders as semiskilled mechanics at intermediate wage rates for such work. This letter of December 7 from the subcontractor to plaintiff was as follows:

"Your letter of this date with copy of Capt. Feltham's letter of the 6th is received.

"In connection therewith wish to submit the following facts: Under our contract we thought we had the right to employ three classes of labor, mechanic, semiskilled, or what we term improvers and common labor and are still of that opinion, the definition of an improver or semiskilled being a man that can do more than just hand material to a

mechanic and that can make tile cuts, run machines on terrazzo, repair tile, etc., but not good enough to do mechanical work. In the beginning of our work, we proceeded on that basis or theory, but in a conference with Mr. Dodd, of Inspector's Office, which we believe you, the business agent of the Union along with writer and several of our men attended, we were told very positively by Mr. Dodd that we could not use any intermediate grade of labor, either a man was a mechanic or labor and if any man used a tool he was to be classed as mechanic. With this ruling we have literally complied by using only mechanics and
103 common labor, such mechanics being secured through the Union and labor through reemployment office, for the reason had we been allowed to use semiskilled labor, it would have speeded the work considerably, thereby lowering the unit costs of installation.

"In an endeavor to comply with this ruling we are using ordinary labor on our grinding machines at 45¢ per hour and wish to say further that it is customary with terrazzo contractors to use semiskilled labor on grinding, at a higher rate than ordinary labor, usually running around about 15¢ hour more and we would have liked very much to use such labor on this grinding rather than the labor now being used.

"At no time, nor any place we know about, nor the usual practice among terrazzo contractors to use mechanics to do grinding as it has never been considered skilled mechanical work, but, as stated, semiskilled. In support of our position, we will present letters from various terrazzo contractors as to the usual practice in this connection.

"If we are allowed to use semiskilled labor on this grinding, would be pleased to remove present grinding machine men and replace with above grade at 60¢ per hour which will lower the finished costs."

December 12, plaintiff submitted this letter to the defendant and wrote the supervising superintendent with reference to his order of December 6, as follows:

"Reference my contract with the Veterans' Administration for construction of Roanoke Veterans Hospital, under your supervision, and particularly your letter of December 6th regarding rate of pay for terrazzo grinding machine operators.

"In this connection I am enclosing copies of letters from two contractors engaged in this class of work, also copies of exchange of telegrams between Mr. Winstead and Mr. Gleason, President of the International, whose headquarters are in Washington. From this correspondence and telegrams it seems that the proper rate for this class of work is 60 cents per hour, and from copy of letter from Roanoke Marble & Granite Company, who is my subcontractor for this work on the above job, you will note how Mr. Wilson of this Company became confused as to classification of men on this job.

"We will pay the men who have operated these machines
104 60 cents per hour for the time they operated the machines, and will furnish you with evidence that this is done, and we will pay 60 cents per hour for the grinding that is yet to be done, and we trust that this will meet with your approval."

December 13, 1934, defendant's superintendent of construction wired the contracting officer as follows:

"Request interpretation if men running electrically operated terrazzo floor grinding finishing machines are considered skilled or unskilled labor Stop Contractor paying forty-five cents per hour for this class of work."

As in the case of the submission by the supervising superintendent to the "Department of Labor" concerning reinforcing steel workers, the above telegram to the contracting officer was a misleading and false submission of the true controversy. Honesty required that the superintendent ask the contracting officer for an interpretation whether the work of operating terrazzo floor grinding machines should be classified as skilled or semiskilled labor. The parties were in agreement that this work was not unskilled labor and there was no controversy about that when the superintendent made his ruling on the $1.10 per hour basis on December 6. On the same day the contracting officer wrote the superintendent of construction stating that "Reference is made to your telegram of December 13, 1934, requesting to be informed as to classification of men running electrically operated terrazzo floor grinding finishing machines at Veterans' Administration Facility, Roanoke, Virginia. It is required by this office that skilled mechanics be used for performing this work."

In this telegram the contracting officer did not decide the real controversy or dispute, which was whether the contract contemplated or recognized the usual and customary labor classification as semiskilled work at an intermediate wage rate, under the direction and supervision of skilled mechanics. The Contracting Officer finally got the question correctly stated when the Supervising Superintendent sent him the correspondence of the plaintiff and the subcontractor, and he then correctly decided the controversy as plaintiff and the subcontractor had all along contended. December 14, 1934,
105 defendants' superintendent of construction wrote plaintiff quoting the above letter from the contracting officer.

December 14, 1934, the superintendent of construction wrote the contracting officer as follows:

"Acknowledgment is made of your letter of December 13, 1934, in reply to the writer's telegram of December 13th in connection with the contractor using unskilled labor to operate electric grinding machines on terrazzo floors at Veterans' Administration Facility, Roanoke, Virginia.

"For your information, you are advised that the contractor was notified on this date to comply with your instructions.

"I am attaching herewith correspondence from the contractor and copies of letters and telegrams received by him from the McClamroch Company of Greensboro, N. C., from which you will note that it is customary to pay these operators 60c per hour. However, this is classified as skilled helpers under the State P. W. A. but not on Federal projects."

December 15 plaintiff wrote the contracting officer further protesting the decisions and rulings which had been made as follows:

"Reference is made to my contract for construction of Veterans' Facility at Roanoke, Va., and particularly your letter of December 14th quoting telegram received by you under date of December 13th from Central Office of the Veterans' Administration, relative to the rate of pay for operators of terrazzo floor grinding machines.

"Under date of December 12th I submitted to you statements from two terrazzo contractors, and a statement from the Presiden of the International Union of Brickmasons, whose members are doing work on this project, and all of this data bore out my contention as expressed in my letter of December 12th, that this work was not that of a skilled mechanic but that of a helper and should be rated accordingly.

"I am submitting herewith further data in regard to this rate, in the nature of a statement from Mr. J. M. Fuhrman, Executive Officer of Divisional Code Authority for Terrazzo & Mosaic Contracting Industry Division of the Construction Industry, with headquarters at Louisville, Kentucky. You will note that Mr. Fuhrman says that men who run these machines are classified as helpers. This letter is dated December 12th.

106 "I am also enclosing copy of a telegram, dated December 12th from Mr. Henry C. Burns, who, I understand, is the Union's representative of tile and terrazzo workers in the State of Virginia. Mr. Burns' headquarters are at Richmond, Virginia, and you will note that he is under the impression that this is the work of helpers, but suggests that Mr. Gleason, of the International Union, pass on this question. With my letter of December 12th I forwarded you copy of a telegram from Mr. Gleason in which he stated the operators of terrazzo grinding machines were classified as helpers.

"It is respectfully requested that you and Central Office again review all of this data, and with this information before you, namely, that of the Code Authority for the Industry, and that of organized labor and that of contractors engaged in this line of work on Government projects, all of which signify classification of terrazzo grinding machine operators as that of helpers, I believe you will agree with the contention set forth in my letter of December 12th that 60 cents per hour is the rate applicable for the operators of these machines.

"After this data has been thoroughly digested by you and Central Office I would like to have your reaction thereon."

December 22, 1934, the contracting officer wrote the superintendent of construction that "This matter is being looked into further and you will be advised in connection therewith at an early date." January 14, 1935, the contracting officer wrote the superintendent of construction as follows:

"Further reference is made to your letters of December 14, 1934, and December 19, 1934, concerning the classification of employees operating electric grinding machines for installation of terrazzo floors. This matter was taken up informally with the union repre-

sentatives in Washington and they indicated that semiskilled laborers are customarily used on this type of work, under the supervision of a skilled mechanic and that intricate grinding was actually performed by a skilled mechanic.

"It would be appreciated if you would advise this office as to whether terrazzo grinding on this project has been completed and if not the extent of the work yet to be performed."

107 On January 15, 1935, the superintendent of construction wrote the contracting officer as follows:

"Reference is made to your letter of January 14, 1935, concerning the classification of employees operating electric grinding machines for installation of terrazzo floors throughout the buildings, at the Veterans Administration Facility, Roanoke, Virginia.

"For your information you are advised that terrazzo grinding on this project has been completed."

As a result of defendant's rulings and requirements with reference to the classification of and wages to be paid to the workmen employed by plaintiff's subcontractor for installing and laying tile, terrazzo, marble, and soapstone called for by plaintiff's contract, the costs of labor were $9,730.27 in excess of what the reasonable cost thereof would have been had the defendant permitted plaintiff to use and pay semiskilled labor as he had planned and upon which he based his estimates as hereinbefore set forth in these findings.

Plaintiff paid his subcontractor, the Roanoke Marble & Granite Company, Inc., the total consideration named in his subcontract of $37,940.77. Neither the plaintiff nor the subcontractor has been reimbursed or paid by defendant for any portion of the excess and extra labor costs incurred and paid by the subcontractor.

20. Additional facts supplementary to the foregoing findings and a part of and applicable to the conditions and circumstances disclosed and set forth in the preceding findings.—Early in plaintiff's work under his contract he began, as he had planned and as was customary and proper, to set up a large central concrete mixing plant and also to use at the site at certain places for certain small portions of concrete work not a part of the main mass concrete work, a portable paving concrete mixer. This was necessary for the speedy and proper prosecution of the work. Defendant's supervising superintendent and his assistant who held the position of superintendent-inspector, ruled and directed plaintiff that he could not use a central mixing plant. Plaintiff immediately took the matter to the contracting officer who ruled and decided that plaintiff's plan and equipment were
108 proper and approved them. Shortly afterwards the defendant's supervising superintendent and his assistant arbitrarily and without reason, ruled and instructed plaintiff that he could not and would not be permitted to use the portable paving mixer in addition to the central mixing plant. Plaintiff took the matter to the contracting officer who approved as entirely proper the use of the portable paving mixer in addition to the central mixing plant. Defendant's officers at the site of the work showed evidence of resentment at being

overruled in their actions and from that time until the work was completed and in various ways entered upon a course of unreasonable, unauthorized, and improper and unfair conduct and attitude toward plaintiff, his work and his officers and employees. This was due in part to a feeling of unfriendliness on the part of defendant's agents toward the contracting officer's office, and in part in a desire and for the purpose of punishing the contractor for objecting and protesting their rulings, directions, and instructions, and also for the purpose of making it appear that plaintiff's force and plant were incompetent, inefficient, and inadequate, and that plaintiff was responsible for seriously delaying the progress of the work rather than, as was the fact, that the work was being unreasonably delayed by failure of the government to have the necessary mechanical work properly performed. They made incorrect, misleading, and untrue reports to the contracting officer's office and in many instances concerning the performance of the work and in their instructions, directions and requirements the defendant's officers at the site of the work failed to exercise an honest judgment.

As required by his contract the plaintiff under Article 19 made application to and secured his labor for various classes of work through the U. S. Employment Office at Roanoke. In requesting such labor he specified the class of work to be performed by the men requested and asked for men who had had experience in such work. The men so requested were supplied so far as the employment office was able to do so, and such of them as were sufficiently competent, experienced or able to perform the work were employed and used. The employment office and plaintiff and his subcontractors always gave strict preference to war veterans. Plaintiff and his subcontractors
109 did not intentionally or knowingly fail to strictly comply with and conform to all of the wage and hour and other labor provisions of the contract and specifications and the regulations of the Federal Emergency Administration of Public Works.

After it had been held under the confused conditions and circumstances set forth in the preceding findings that plaintiff could use only two classes of labor, i. e., skilled mechanics and common laborers, it was necessary for plaintiff to let some of his competent laborers go because they were not sufficiently experienced to be classified as skilled mechanics although they met all the requirements for semiskilled workers for work of a semiskilled classification. In this connection men on reinforcing steel work and semiskilled carpenters and helpers and assistants were affected. Thereupon plaintiff made application to the U. S. Employment Office for skilled labor on work as reinforcing rodmen. Men highly skilled in reinforcing steel work could not be supplied and the employment office went outside the Roanoke district into other districts of the state in an effort to secure such men. A supply of men was sent to plaintiff. A number of them had not long been residents of Virginia but this fact was not known to plaintiff nor did plaintiff have any responsibility in that connection after the men had been certified by the employment office. Plaintiff used such

of the men supplied as were sufficiently competent to perform the work. A number of them had to be rejected or dismissed for incompetency or lack of experience in reinforcing steel work. A very few of the men whom plaintiff found it was necessary to dismiss for incompetency in that work after they had been employed and tried out, were structural steel workers who were members of the International Association of Bridge, Structural and Ornamental Iron Workers' Union. They were structural steel workers and had no experience in reinforcing steel work. Under the contract the question of whether a man sent by the employment office should be accepted, employed, or dismissed after he had been employed and tried out, and whether he was competent for lack of experience or otherwise was a matter solely for the determination and decision of the contractor. Defend-
110 ant's superintendent and inspector had no authority as to whom plaintiff should employ or whom he should not dismiss. But defendant's officers at the site of the work did undertake arbitrarily to assume this authority and undertook to order plaintiff to retain laborers in his employ whom plaintiff considered incompetent, and to order him to reemploy men whom he had rejected or dismissed for incompetency. Plaintiff, in a spirit of complete cooperation which he manifested throughout the work, endeavored to comply even against his own judgment and that of his officers of long experience, but in some instances he could not and did not comply. In one instance, defendant's officers, on threat of punishment, ordered plaintiff to reemploy and use laborers whom plaintiff had dismissed for incompetency and lack of experience. Plaintiff did so but after several days had to again dismiss the man. Thereupon the defendant's officers and agents at the site arbitrarily and without cause dismissed and discharged from the job one of the plaintiff's most experienced and competent men in charge of the reinforcing steel work. This man had had many years' experience in reinforcing steel work and was highly skilled. He had been with plaintiff's organization for a number of years as foreman of reinforcing steel work.

As a result of plaintiff's action of rejecting and dismissing some of the men sent to him by the employment office for reinforcing steel work, a representative of the Roanoke Central Labor Union made a complaint to Mr. Woodrum, a member of Congress, and the Public Works Administration that plaintiff was violating his contract by refusing to employ men from Roanoke and employed men from Richmond sent him by the employment office.

Plaintiff was not advised and had no knowledge of these complaints. This was in May 1934. About the same time defendant's officers at the site of the work falsely and without the knowledge of plaintiff reported that plaintiff was trying to unionize the job with the idea and for the purpose of getting on the job a lot of his former employees from Alabama. Plaintiff never had any such idea or made such an attempt. Plaintiff did on June 22, 1934, with full knowledge and consent of the government and as he had a right to do,
111 make a written agreement with Local Union No. 319, United

Brotherhood of Carpenters and Joiners of Roanoke, Va., which provided "that in employing carpenters and joiners for the carpentry work in erecting the buildings in connection with the U. S. Veterans Hospital at Roanoke, Va., that the said carpenters and joiners will be secured through the Local Union's representative. * * * that the competent mechanics now employed, who desire to affiliate with the Local Union, will be permitted to continue their work on this project after affiliating themselves with the Local Union. * * * that the Local Union will secure a sufficient number of men to carry on the work." This agreement was complied with by both parties.

June 26, 1934, the Director of the Division of Investigations of the Federal Emergency Administration of Public Works had an Agent sent to Roanoke to make an investigation and report. This investigation was made during the period June 26 to July 10, 1934. A further investigation was made by the same agent August 20 and 21, 1934 and reports were made. Plaintiff had no knowledge of these investigations and reports until about a year later in June 1935. The investigator secured practically all his information on the basis of which he made his reports and recommendations from defendant's supervising superintendent and his assistant. The information furnished and the representations made by them to the P. W. A. investigator were greatly exaggerated, incorrect, misleading, and in many particulars false. The P. W. A. investigator made his reports on the basis of the information, statements and representations so made to him by defendant's officers. Upon such information the reports stated (1) that plaintiff was violating the wage provisions of the contract; it is recommended (2) that the plaintiff be required to dismiss from the work all employees non-residents of Roanoke, Va., unless they could show actual residence in Virginia; (3) that one of plaintiff's key supervisory men be discharged because he had done labor work and because he was a resident of Florida (the sole and only basis for the charge made by defendant's officers to the investigator of the performance by this man of labor work was that in walking on the road to the site of the work he
112 saw a rock about twelve inches or so in diameter which had fallen off a truck and picked it up and laid it out of the way to the side of the road); and (4) "that Algernon Blair, Contractor, be debarred from bidding on future contracts under the P. W. A. * * * that he be relieved of his contract for the erection of the Veterans' Administration Facility at Roanoke, Virginia. * * * that the facts regarding the contracting for labor by Algernon Blair, Contractor, in violation of the Code of Fair Competition for the Mason Workers Industry be furnished the Code Authority of the National Industrial Recovery Administration. * * * that the facts in this case be presented to the United States Attorney at Roanoke, Virginia, for his opinion as to whether prosecutive action will be instituted, with particular reference to the submission of certified payrolls * * * when the prescribed rates of wages have not been paid." These reports set forth that the investigator had been told by defendant's supervising superintendent and his assistant that plaintiff had placed and had to

tear out and replace at least $30,000 worth of defective concrete and $6,000 worth of defective brickwork. The statements to the investigator were false.

Upon being advised by the Public Works Administration of complaint which had been made concerning the employment and payment of labor the contracting officer write the Emergency Administration of Public Works before the abovementioned report was made that the contractor was paying the wages called for by the contract and was fully complying with the contract requirements as to securing laborers and mechanics for the project.

No action was taken by the Director of the Emergency Administration of Public Works on the information obtained from defendant's officers.

After plaintiff had completed his contract at Roanoke he was awaiting the award of a contract and notice to proceed on another substantial Public Works Administration building project as to which he had been advised he was lowest bidder. Not knowing why the matter was being delayed plaintiff inquired of the Public Works Administration about the matter near the first of June 1935 and was advised for the first time that some unfavorable charges had been made
113 against him in connection with the Roanoke project and that he should get in touch with Colonel Hackett, Director of Housing of the Emergency Administration of Public Works. Plaintiff immediately did so and asked Colonel Hackett concerning any charges and requested that he be given an opportunity to be heard thereon. Colonel Hackett advised plaintiff of the charges as hereinbefore set forth and granted plaintiff a hearing. The hearing was held before Director Hackett and two other representatives of the Public Works Administration. Plaintiff met each of the charges and submitted his answer and proof thereon. After the hearing the Board of three considered the matter and found the charges to be groundless and dismissed them all. Thereupon plaintiff was awarded the other Public Works Administration contract and given notice to proceed. The contract was satisfactorily completed and plaintiff has been awarded and has performed other government contracts since that time.

21. Claim for $15,180.52 by reason of defendant's requirement that plaintiff use local sandstone.—The requirement with reference to the stone work called for under plaintiff's contract are set forth in specifications 9C, pages 1 to 4, inclusive. These specifications provided in part as follows:

"The contractor shall furnish and set all limestone, sandstone, or granite to complete the work as indicated on drawings or as specified.

"All stone work throughout the job shall be limestone, sandstone, or granite as indicated or specified. Materials indicated on drawings as stone shall be cut limestone or sandstone except where granite is indicated or specified. Stone work indicated on drawings as rubble shall be a random broken range ashlar local sandstone as hereinafter specified.

All rubble or broken range ashlar *stone work shall be a local sandstone of a buff color*, with a variegated run of quarry color, the darker shades predominating. [Italics ours.]

The specifications required the contractor to submit to the contracting officer for approval four samples each of the light colored and dark colored standstone, two samples of limestone and two
114 samples of granite, which should be typical of the extremes which he proposed to furnish. Subdivision (d) of Article 7 of the contract provides as follows:

"*Local preference.*—So far as practicable, and subject to the provisions of sections (b) and (c) of this article, preference shall also be given to the use of locally produced materials if such use does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the contracting officer."

At the time of estimating his costs and making his bid plaintiff assumed that there was available, already mined, local sandstone of such character as could be sawed and otherwise easily worked with tools. He did not make any local investigation. After the contract had been made and the plaintiff had started with the work he made an investigation with reference to the stone available locally and found that in order to obtain stone locally it would be necessary for him to quarry and haul it to the site of the work. This investigation disclosed that the only local sandstone available was so hard and abrasive that it could not be sawed but had to be cut into proper shape and thickness with other tools. Plaintiff had a conference with reference to the matter with defendant's superintendent of construction and the contracting officer and insisted that there was no commercial sandstone, within the meaning of the specifications, available locally and asked to be permitted to obtain from either Tennessee or Ohio brown sandstone that could be sawed. The contracting officer had plaintiff and the superintendent of construction come to Washington for a conference with reference to the matter and the contracting officer, after hearing the plaintiff and considering the matter, decided and required plaintiff to use the character of sandstone obtainable locally near the site of the work. The contracting officer selected the local sandstone to be used in the buildings from samples of the sandstone submitted by plaintiff. This stone was hard and durable and available in commercial quantities near the site of the work. The proof does not establish that this stone, although harder than some other sandstone, was not local sandstone within the meaning of the contract. It was workable with tools and
115 could be and was cut into narrow strips as required by the contract and the specifications for use in the buildings. The same stone had previously and has since been used locally and worked with tools into narrower strips than those required by the contracting officer to be used by plaintiff under his contract.

Plaintiff made no inspection of the stone to be used before the contract was executed, and defendant offered no information or made any representation to plaintiff as to the type of sandstone available locally

or as to the means of obtaining the stone. The decision and requirements of the contracting officer with reference to the use of the local stone were not unreasonable, arbitrary, or grossly erroneous. The contract did not call for "commercial sandstone" as that term might be understood in some other locality or state.

The net cost to plaintiff of quarrying and delivering the stone to the site of the work was $28,614.32. Had the contracting officer permitted and allowed plaintiff to purchase and use sandstone available in Tennessee, plaintiff could have purchased the necessary stone delivered at the job at a cost of not in excess of $13,433.80, a difference of $15,180.52.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover $130,911.08.

It is therefore adjudged and ordered that plaintiff recover of and from the United States one hundred thirty thousand, nine hundred eleven dollars, and eight cents ($130,911.08).

Opinion

LITTLETON, Judge, delivered the opinion of the court:

The seven items making up plaintiff's claim of $146,091.60, damages alleged to have been sustained in performance of the contract dated December 2 and executed December 14, 1933, for which it is alleged the defendant is liable, are set forth in finding 13. The first six items of the claim, all involving excess and extra costs and expenses alleged to have been unnecessary and not required by the contract, relate
116 to different items of work and delay and are all more or less related in fact and law as to the grounds upon which plaintiff bases his right to recover. The seventh item of the claim for $15,180.52 with reference to alleged excess cost for local building stone which plaintiff was required to use stands on its own facts.

The contract under which plaintiff's claim is made was wholly prepared and written by the defendant. Therefore, it should be stated at the outset that under the well established rule of law defenses to acts, conduct, rulings, and decisions cannot be sustained where, in order to sustain them it is necessary to resolve all doubts in favor of the party who prepared and wrote the contract and specifications. Callahan Construction Co. v. United States 91 C. Cls. 538, at pp. 611, 612. It should also be stated that where the acts, conduct, rulings and decisions of the designated and authorized officers and agents of one party to the contract in connection with the performance thereof by the other party, are so unreasonable, arbitrary and capricious as to make it difficult or impossible for the other party to literally comply with some provision of the contract, such other party is relieved from strict compliance and substantial compliance will suffice. In other words, acts and conduct which are arbitrary, capricious, or unauthorized and so grossly erroneous as to imply bad faith amount to a breach of the

contract or constitute a waiver of strict compliance by the other party. United States v. Gleeson, 124 U. S. 255; United States v. United Engineering & Contracting Co., 234 U. S. 236; Ripley v. United States, 223 U. S. 695; Standard Steel Car Co. v. United States, 67 C. Cls. 445.

Art. 3 of the contract contained the usual provision in Government contracts, the contracting officer might at any time by written order make changes in the drawings or specifications and within the general scope thereof; that if such changes caused an increase or decrease in the amount due under the contract or in the time required for its performance, an equitable adjustment should be made and the contract modified in writing accordingly; that no change involving an estimated increase or decrease of more than five hundred dollars
117 should be ordered, unless approved in writing by the head of the department or his duly authorized representative, and that any claim for adjustment under that article must be asserted within ten days from the date the change is ordered unless the contracting officer should extend the time, and that if the parties could not agree upon the equitable adjustment to be made in the contract price the dispute should be determined as provided in Art. 15; but that nothing provided in Art. 3 should excuse the contractor from proceeding with the prosecution of the work. No such written changes were made. Art. 15 provided that all labor issues arising under the contract which could not be satisfactorily adjusted by the contracting officer should be submitted to the Board of Labor Review. No labor issue within the meaning of this provision arose under the contract. Article 15 further provided that all other disputes as to questions arising under the contract should be decided by the contracting officer or his duly authorized representative subject to written appeal by the contractor within thirty days to the head of the department concerned or his duly authorized representative, whose decision would be final and conclusive upon the parties as to such questions, and that, in the meantime, the contractor should diligently proceed with the work as directed. Art. 5 of the contract provided that except as otherwise therein provided no charge for extra work or material would be allowed unless the same had been ordered in writing by the contracting officer and the price stated in such order.

Art. 9 of the contract related entirely to termination of the contract and to the matter of liquidated damages at the rate of $175 per day to be paid to the defendant by plaintiff in the event the contract was not completed by plaintiff within the time fixed by the defendant. This Article provided as follows:

"That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unfor[e]seeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy,
acts of the Government, fires, floods, epidemics, quarantine re-
118 strictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Pro-

vided further, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto."

This provision does not apply to any of the claims here involved. The contract was completed within the time fixed by the defendant. For that purpose no extension of time was necessary or was made.

The time for completion of the work called for by the contract so as to relieve plaintiff of any liability to defendant for liquidated damages for delay was fixed by the defendant in the invitation for bids and in the specifications, and not by the plaintiff. The contract and specifications contemplated that the work called for by the contract would be completed at the earliest practical date after the contractor had been given notice to proceed. Plaintiff notified the defendant and defendant's mechanical contractor in writing of his desire and intention to complete the work by Nov. 1, 1934. The mechanical contractor was so notified January 24, 1934. The defendant was so notified as early as March 30, 1934. The contracting officer stated to the plaintiff in writing on April 4 and October 5, 1934 that early completion was desired. The work called for by the contract was completed within the period fixed by the defendant and no question as to liquidated damages to the defendant is involved.

The facts show that in making his bid and in estimating the performance costs for material, labor, and overhead, plaintiff fixed November 1, 1934, as the date when he would complete the work called for by the contract, and the facts further establish that, except for the unreasonable delays in performance caused by the defend-
119 ant, all the work called for by the contract would have been completed by plaintiff by November 1, 1934, 106 days, or three and one-half months earlier than it was completed, and earlier than the period fixed by the defendant for liquidated damages purposes.

The facts established by the record as to the conditions, circumstances, acts, and rulings of the defendant's designated and authorized agents and officers which gave rise to the excess and unnecessary costs and expenses of plaintiff under the first six items of the claim, and the amounts thereof as established by the proof, are set forth in findings 1 to 20 inclusive. Findings 1 to 20 inclusive set forth the facts established by the record as to the first six items, with reference to the acts, conduct, and the requirements and exactions of the defendant's supervising superintendent of construction and his assistant, the superintendent-inspector, who were the authorized representatives of the contracting officer, which were unreasonable, arbitrary, capricious,

and so grossly erroneous as to imply bad faith. They cannot be any better summarized here. The facts as to the reason for plaintiff's inability and failure to strictly follow and comply with the literal language of articles 5 and 15 of the contract, and the failure also of the contracting officer to strictly follow those provisions and his complete acquiescence in the course of conduct and procedure adopted and followed by plaintiff in this regard are also set forth in the findings.

Under the facts so established and set forth in the findings, and under the well-established principles of law hereinbefore mentioned, the plaintiff is entitled to recover as damages the actual increased costs and expenses for materials, labor, and overhead not included in his bid nor the contract price, for work and delay not contemplated or required by the provisions of the contract and specifications and resulting from and caused by the acts of the Government's authorized agents and officers.

The clear duty rested upon the defendant, acting by and through its agents and officers in charge of the work under the contract, not to delay the contractor in the performance of his work called for by the contract. It was also their duty to cooperate with plaintiff in every reasonable way to the end that the work as called for by the contract might be properly performed and completed as early as practicable so that neither the plaintiff nor the defendant would be put to extra costs or expenses. The proof conclusively shows that plaintiff fully cooperated in every way but that defendant entirely failed to do so. The proof shows beyond doubt that defendant did seriously delay the plaintiff in his performance; that defendant's officers at the site of the work deliberately and without reasonable cause, delayed plaintiff and deliberately sought to punish him for contesting their instructions, thereby causing plaintiff's costs and expenses to be greatly increased in certain particulars over the contract price and over what his performance costs would otherwise have been. The acts of the defendant's supervising superintendent of construction and his assistant, which the contracting officer could not and did not prevent when properly, under the circumstances, brought to his attention by plaintiff, constituted a violation and breach of the express and implied stipulations and obligations of the defendant under the contract. The decisions are uniform that where the defendant unreasonably delays a contractor it is liable to him for the damages resulting from such delay. The decisions are also uniform that where the defendant substantially contributes to the failure or inability of a contractor to comply strictly with some contract provision, such provision as well as compliance therewith is waived. Standard Steel Car Company v. United States, 67 C. Cls. 445. United States v. United Engineering and Contracting Co., 67 C. Cls. 236, 234 U. S. 236. Especially is this true where the particular provision is procedural and one intended for the benefit of the defendant. Where a contract provides that a contractor shall appeal within 30 days from the decisions or findings of the contracting officer and, as was the case here, the failure of the

120

contractor to so appeal is caused by the acts and conduct of the Government, the contract provision cannot be set up by the Government as a defense. Penker Construction Co. v. United States, 96 C. Cls. —. In all such express provisions concerning appeals to the head of the department there is clearly implied an undertaking by the
121 Government that its officers will cooperate with the contractor and not be guilty of any act or conduct which will place in the way of a contractor obstacles of such a character as to make it unreasonably difficult or impossible for the contractor to effectively comply literally with the provisions and strictly follow the method expressly outlined. In this case the acts and conduct of defendant's officers at the site of the work and the effect thereof were of such a nature that it was impossible for plaintiff to protest in writing each time in the usual way through the officer at site of the work, to get a written ruling from the contracting officer at Washington and then to appeal in writing to the head of the department. The contracting officer realized this and acquiesced in the procedure followed by plaintiff of making prompt and full oral protests to the officers at the site and to the contracting officer and the holding of conferences by the contracting officer and plaintiff for the discussion of such protests.

There is also an implied undertaking on the part of the Government in such provisions as Art. 5, hereinbefore referred to, that if work or material not called for by the contract and specifications is required by the authorized representatives of the contracting officer, to be performed or furnished, a written order therefor will be given, and if there is a failure or refusal to give such order and the contractor is foced or compelled by other means, as was done in certain instances in the case at bar to do such work or furnish such materials, there is a breach of the contract. The contractor is, therefore, not barred from recovering his extra costs and expenses because such work or material was not ordered in writing, and the contract provision cannot be set up by the defendant as a defense to the claim.

Art. 15 of the contract relating to disputes also clearly contemplated and there was, therefore, an implied agreement that the defendant's designated and authorized representatives, agents, and officers in charge of the work would not interfere with or hinder the contractor in questioning the propriety or correctness of their acts, instructions or requirements during the prosecution of the work and in submitting his protests and objections. Above all, there was clearly implied
122 in such provision an obligation on and undertaking by the defendant not to commit or permit any act intended as punishment of the contractor for so attempting to invoke the contract provision and follow the procedure therein provided so as to obtain a fair and impartial decision of disputes on the basis of a true state of facts and circumstances. Ripley v. United States, 223 U. S. 695; Globe Grain & Milling Company v. United States, 70 C. Cls. 595.

The facts and circumstances established by the proof in the case at bar show that the defandant's supervising superintendent of construc-

tion and his assistant were guilty of acts of punishment and such unreasonable, arbitrary, capricious, and grossly erroneous acts and conduct toward plaintiff and his officers and employees engaged in performance of the work as to make it impossible for plaintiff openly, fairly, and in the ordinary manner to protest the many acts, conduct, requirements, rulings, and decisions of such officers to the contracting officer to the end that plaintiff might obtain an open, fair, and independent decision from the contracting officer on disputes between the defendant's agents and officers in charge of the work and the contractor. The proof in this case shows that throughout the performance of the contract the plaintiff, his superintendent, his foremen, and his employees endeavored in every way possible to follow and comply with all reasonable instructions, orders, and requirements of the defendant's supervising superintendent of construction, and his assistant, and that the plaintiff and his officers and employees cooperated in every way with the defendant's officers in expediting the work and in performing it strictly in accordance with the contract and specifications and in accordance with good engineering and construction practice. Plaintiff and his supervisory organization were highly experienced in the type of construction work called for by the contract and there was not at any time any attempt on the part of plaintiff or his representatives in charge of the work not to meet, fulfill, and comply with all provisions and requirements of the contract and specifications. The plaintiff and his officers and employees were not guilty of any
123 acts or conduct which delayed the prosecution and completion of the work. The plaintiff at all times had on the work an adequate, experienced, and capable force of officers and men, and sufficient and adequate material and equipment for the proper prosecution and performance of the work as called for by the contract and specifications, and for completion thereof by November 1, 1934.

In the early stages of the work under the contract certain disputes and disagreements arose between plaintiff and the defendant's officers in immediate charge of the work, with the result that the plaintiff protested to the contracting officer. The contracting officer sustained plaintiff's protests and overruled the instructions and orders of the defendant's representatives in charge of the work. The facts and circumstances and the subsequent conduct of these officers show that they resented having their instructions protested by the contractor and overruled. They thereupon entered upon a course of conduct, for which the assistant to the supervising superintendent of construction was primarily responsible, which could only have for its purpose the punishment of the plaintiff, his superintendent, and foremen for objecting to and protesting their orders and instructions. In many respects they became unreasonable; capricious, and arbitrary in their conduct toward and in their orders to the contractor. They acted in such a way as to retard and delay the progress of the work and to cause the contractor unnecessary performance costs and expenses. In many instances the defendant's superintendent inspec-

tor with approval of the supervising superintendent, recorded and reported incorrect, misleading and false conditions and facts to the contracting officer in Washington. Plaintiff concluded, and in this he was fully justified, that it would make a very bad situation much worse and that it would be impossible, within the bounds of reasonable limits, to make written protests in each instance through the supervising superintendent of construction to the contracting officer. In these circumstances plaintiff justifiably concluded that the best and most practical way of handling the matter of protests and to relieve his superintendent of construction of a task impossible of performance in addition to his other duties, that two additional capable, experienced, and trusted employees should be sent to and stationed at the site of the work to relieve the superintendent of this impossible burden. This was done. Thereafter these representatives of the plaintiff devoted their entire time to the task of acting as conciliators between plaintiff and the defendant's supervising superintendent of construction and his assistant and, personally to submit to and discuss with the contracting officer in Washington the necessary protests, and to promptly and fully lay before him the conditions and circumstances under which plaintiff was operating at the site of the work. The contracting officer seldom made a definite decision but, after discussion of the matters with plaintiff's representatives, he stated that there was little that he could do; that he would do what he could and that plaintiff would just have to do the best he could to get along with the defendant's officers in charge of the work. In the early period of the work under the contract the plaintiff requested the contracting officer to remove the assistant to the supervising superintendent of construction who acted as defendant's inspector, because of his unreasonable and arbitrary attitude and conduct, and to place someone else in that position, but the contracting officer declined to do so. This was a reasonable request on the part of the contractor and was justified under the conditions and circumstances which obtained. The contracting officer was misled in many instances by incorrect, misleading and false statements of fact originating with the defendant at the site of the work of which plaintiff had no knowledge.

124

The whole evidence of record taken together shows and we have so found that on all of plaintiff's protests concerning items 1 to 6 inclusive the final decisions and conclusions of the contracting officer, where he made decisions or reached independent conclusions, were all in favor of plaintiff. The contract certainly did not contemplate or compel the plaintiff to appeal to the head of the department from a decision or conclusion not in writing, or from a favorable decision or conclusion, or to appeal to enforce a favorable ruling.

With these observations and conclusions upon the facts as established by the record, and which apply to the first six items of the claim, these items will be discussed separately.

125 ITEM ONE

This item of the claim is for extra costs and expense which the proof shows amounted to $51,249.52 as a result of plaintiff being delayed for a period of more than three months in the completion of the work called for by the contract beyond the date when the plaintiff would, otherwise, have completed the same. The damages claimed and proven under this item for this delay are independent of the excess costs and damages claimed, and hereinafter mentioned under other items of the claim. The facts with reference to this delay and the increased costs are set forth in findings 14 and 20. The proof shows that the contracting officer delayed unreasonably, either in compelling the mechanical contractor to proceed with his contract with the defendant so as not unreasonably to delay plaintiff or in sooner terminating the contract of the mechanical contractor for failure properly to proceed, and to relet the same so that the plaintiff would not be delayed in the performance of his work. Plaintiff had no control over the mechanical contractor or of the mechanical work which the defendant required to be done and there was a clear duty resting upon the defendant to take such action with reference to the mechanical work as might be necessary to avoid any unreasonable delay in the prosecution and completion of the work called for by plaintiff's contract. The failure and refusal of the mechanical contractor to commence and properly to prosecute the work called for by his contract with the defendant are not chargeable to plaintiff. All that plaintiff could do, or was required to do, was to inform the contracting officer that his work was ready for the mechanical work and to protest the delay and call the same to the attention of the contracting officer, which the plaintiff did on numerous occasions in proper time and in such a way as to enable the defendant to take proper action to have the mechanical work performed and prevent the delay. Plaintiff began to protest this delay in January 1934 and continued to do so until June 26, when the mechanical contractor abandoned his contract and it was formally terminated. The contracting officer telegraphed and wrote the mechanical contractor from time to time urging him to commence
126 and proceed with his work and called his attention to the fact that the construction work was being delayed by his failure properly to prosecute the work. Early in March 1934, three months before the mechanical contract was terminated, the contracting officer advised the mechanical contractor that his contract would be terminated unless he showed improvement in prosecuting his work. Practically no improvement was made. The failure of the contracting officer to earlier terminate the mechanical contract may have been and doubtless was influenced by the misleading, incorrect, and false reports made to him by the defendant's inspector that plaintiff was not being delayed by the mechanical contractor but that the mechanical contractor was being delayed by the plaintiff. But plain-

tiff had no knowledge of these false reports and would not be chargeable with them under any circumstances. The contracting officer was furnished with the true state of facts and conditions by plaintiff. Had the defendant made a reasonable investigation into the ability of the mechanical contractor to proceed properly with his contract during the early part of the period when he should have been engaged upon the work, it would have found that the mechanical contractor did not have adequate materials, equipment and finances to carry out his contract. The contract was terminated June 26, 1934, when the mechanical contractor advised the contracting officer that he would not be able to proceed with and carry out his contract. At that time a considerable portion of plaintiff's work had been performed and his work was further seriously retarded and delayed notwithstanding the efforts of the bondsmen of the mechanical contractor to get the mechanical work moving and to relet a contract therefor to another mechanical contractor. In these circumstances the defendant must, under its contract with plaintiff, answer for the damages, amounting to $51,249.52, caused by this delay.

ITEM TWO

The damages of $25,886.84 claimed under this item represent increased costs for material and labor for outside scaffolds by reason of unreasonable, unauthorized, arbitrary, capricious, and grossly erroneous conduct and acts on the part of the authorized officers of the defendant in charge of the work. Plaintiff endeavored in every way that could be reasonably required of him, under the contract, to prevent this increased cost, without success. The facts applicable to this item of the claim are set forth in findings 15 and 20. This conduct on the part of the representatives of the Government in charge of the work was brought to the attention of the contracting officer, but nothing was done about it. The amount of $10,466.88 of this item of the claim represents the actual cost of material and labor for outside scaffolds around all the buildings which were not called for or required by the contract, and $12,990 represents extra and unnecessary labor costs for brickmasons. Plaintiff incurred the extra costs of $25,886.84 in order to overcome an almost impossible condition an in order to avoid a larger loss and damage by reason of unreasonable, unauthorized, arbitrary, and grossly erroneous action and exactions by the defendant's officers in charge of the work in connection with the brickwork on the buildings as punishment for the refusal of the contractor to erect the scaffolds when first orally instructed so to do. The defendant's supervising superintendent of construction refused to give a written order for the scaffolds because he knew that the contract did not require such scaffolding. The balance of the item $2,429.96 represents the unnecessary and excess costs resulting from unauthorized and unreasonable inspection requirements in connection with mortar joints generally and with reference to brickwork

127

under windows and openings in the building, between the time the plaintiff was told that he would have to use outside scaffolds around all the buildings and the time when plaintiff surrendered to the demand and erected the scaffolds in order to avoid the unreasonable and unauthorized requirements in connection with the brickwork. Plaintiff is entitled to judgment for the amount of this item of the claim.

ITEM THREE

This item of the claim as established by the evidence is $9,033.21 and represents extra and unnecessary expenses due to unreasonable, arbitrary capricious and unauthorized acts and rulings of the defendant's officers in charge of the work. It is made up of (1) salaries and expenses, amounting to $4,952.95 of two men which it was necessary
128 for plaintiff to station at Roanoke to handle matters arising from the conduct, instructions and orders of the agents of the defendant; (2) cost of $2,620.66 for bolting metal concrete form pans, which bolting was unnecessary and not required by the contract; (3) cost of $1,352.10 for performing certain fine grading work in the basement of certain buildings a second time; and (4) $107.50, extra cost of two-way temperature steel improperly required by defendant's superintendent of construction to be furnished and installed by the plaintiff.

Upon the facts established by the record and set forth in the findings, plaintiff is entitled to judgment for $9,033.21 for this item of the claim. See findings 16 and 20.

ITEM FOUR

This item of the claim, as established by the proof, in the amount of $8,657.05, represents $4,365.12 for excess costs for wages which plaintiff was required to pay certain employees in connection with the placing of reinforcing steel rods by reason of demands by the defendant's supervising superintendent of construction as the authorized representative of the contracting officer, and $4,291.93, excess and unreasonable costs and expenses resulting from direct and improper interference with the reinforcing steel work under the contract by the defendant's officers in charge of the work. The facts established and applicable to this item of the claim are set forth in findings 17 and 20.

This was a Public Works Administration contract prescribed by the Federal Emergency Administration of Public Works and carried out through the office of Director of Construction of the Veterans' Administration with funds supplied by the Public Works Administration of which the Secretary of the Interior was the Administrator. A reading of the contract, Art. 18, which is set forth in finding 17, the P. W. A. Bulletin 51, P. W. A. Release No. 56 and letter of the Administrator of the Federal Emergency Administration of Public Works, together with a schedule showing the action taken by a committee composed of

representatives of the contractors, labor, and borrowers of public funds acting under authority of the Administrator of the Federal Emergency Administration of Public Works, and The Virginia Public
129 Works Advisory Board, shows that plaintiff's contract contemplated and provided for three classes of labor—namely, skilled labor at a minimum of $1.10; unskilled labor at a minimum of 45 cents an hour; and semiskilled labor, such as assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen and mechanics and who were not to be termed as unskilled laborers, at an intermediate rate of wage between the minimum fixed for labor specifically classified as skilled labor and labor specifically classified as unskilled or common labor. Subsection (4) of Art. 18 of the contract, when read in connection with other provisions, seems plain enough on this point, but before making his bid, which necessitated an estimate for the cost of the various classes of labor necessary to perform the work called for by the contract, the plaintiff wrote the Secretary of the Interior, as administrator of the Federal Emergency Administration of Public Works, with reference to the matter for an interpretation of the contract labor classication provisions of the contract and of Release No. 56 of the Public Works Administration. The Administrator replied that the wage provisions of the P. W. A. contract, under which plaintiff was preparing his bid, anticipated that there would be certain semiskilled workers who would receive wages in an intermediate grade at less than the rate for skilled workers mentioned; that the Public Works Administration had not predetermined the wage rate for such intermediate grades; that the wage rate set for skilled workers took into consideration the very restricted working week of 30 hours provided by law, and that in setting the wage rate for any intermediate grade the same factor should be taken into consideration and that "It is, of course, provided that carpenters' helpers, etc., should not be classed as common labor." In making his bid plaintiff took these matters into consideration, as well as the usual, customary, and recognized labor classifications, and estimated for the employment and use of certain laborers in semiskilled classifications at prevailing intermediate rates of wages as customary in the trades, between the minimum prescribed for skilled labor and the minimum wage rate prescribed for common labor. At the beginning of the work plain-
130 tiff prepared his schedule of wages showing the skilled, unskilled, and intermediate grades and rates and this schedule was approved by the supervising superintendent of construction as the contracting officer's authorized representative, and it was posted. Later, as detailed in the findings, the defendant's supervising superintendent without any justifiable reason and contrary to the usual and customary practice recognized by labor, industry and the government and contrary to the intent and meaning of the provisions of Art. 18 and the ruling of the Administrator of the Federal Emergency Administration, notified the plaintiff that he would not be permitted to use workers classified as semiskilled labor at an intermediate wage rate between the minimum fixed for skilled labor and that fixed for com-

mon labor, and that any worker who was not engaged in performing strictly common labor must be classified as skilled labor and paid $1.10 an hour as a skilled mechanic. Plaintiff protested to the supervising superintendent and the contracting officer but nothing was immediately done about it. The contracting officer did not make an independent decision on the matter. Neither defendant's supervising superintendent of construction nor the contracting officer ever regarded or considered the matter of interpretation of the contract concerning classification of labor as a labor issue or a matter properly to be submitted to and considered by the "Board of Labor Review" mentioned in Article 15. As set forth in finding 17, the defendant's supervising superintendent of construction on March 15, 1934, wrote a letter addressed to the "Department of Labor, Washington, D. C.," stating that "there being only two scales, skilled and unskilled labor [on the project], this office is unable to determine in which class the reinforcing steel rodmen should be placed," and asking "your interpretation" as to "whether concrete reinforcing steel rodmen, who fabricate and place reinforcing steel in forms, are considered skilled workmen." This misleading letter of "submission" started a chain of events which finally resulted in rulings which were followed by the contracting officer which were unauthorized, arbitrary, and so grossly erroneous as to raise the implication of bad faith. Of course, the bad faith originated
131 with the office of the defendant's supervising superintendent of construction, but it permeated every subsequent action and ruling, with reference to intermediate labor classifications concerning reinforcing steel work, carpentry work, and tile and terrazzo work. The contracting officer finally, as hereinafter set forth under item six, correctly decided the real question involved and correctly interpreted the contract when he held that terrazzo grinding, etc. should be classified under the contract as semiskilled labor at an intermediate wage rate. But that decision came too late to be of any value to plaintiff as all of the work in connection with which the question arose had been completed.

On March 20, 1934, one Hollenbeck, the "Administrative Assistant for the Veterans' Placement Service, Department of Labor" at Washington, wrote the defendant's supervising superintendent of construction at Roanoke in reply to his letter of March 20, supra, that "The determination of the Public Works Administration" was "That men classified as steel rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen" and that the carrying of steel material to the rodmen could and was, usually, done by unskilled labor. This letter did not decide or purport to decide the true question involved between plaintiff and defendant. It is perfectly obvious from the letter of March 15, of the defendant's supervising superintendent of construction, which was written by his assistant, that he positively and definitely decided the question involved and asked for an interpretation on a matter concerning which there was no controversy. There was never any controversy about the fact that if the contract did contemplate and

recognize only two labor classifications, reinforcing steel work would have to be placed in the skilled labor class and not the unskilled or common labor class. Moreover plaintiff was paying the prevailing intermediate wage rate, and there was no controversy about that. Therefore the dispute between the parties was solely one which concerned the interpretation of the contract, and under Article 15, was one for the independent decision of the contracting officer. But as above stated he was led astray and did not really decide it until
132 much later. The true question involved was not one for decision under the contract either by the Labor Department or the Public Works Administration, and the so-called ruling of March 20, on a question which was not in dispute was not binding and conclusive on plaintiff. Plaintiff never saw the letter of March 15, from defendant's supervising superintendent to the "Department of Labor" and did not at any time have knowledge of its contents and neither did the contracting officer. The contracting officer only saw Hollenbeck's reply of March 20.

Upon receipt of the Hollenbeck letter a day or two later the defendant's supervising superintendent of construction notified plaintiff that the "United States Department of Labor" had ruled that men who worked at placing or tying reinforcing steel rods should be classed under the contract as skilled laborers; that plaintiff had violated the labor classification provisions of the contract and that he must pay all men engaged on reinforcing steel work $1.10 an hour and all those who had theretofore been paid at an intermediate rate must be paid the difference between 60 cents an hour, which they had been paid, and $1.10 an hour. Plaintiff still protested the supervising superintendent's instructions to the contracting officer and a conference thereon was held between the contracting officer and plaintiff. The contracting officer apparently felt bound by the statements in the letter of March 20, and took no independent action on the matter. See Phoenix Bridge Co. v. United States, 85 C. Cls. 603, 626, 627, 629.

In connection with the work of placing and tying reinforcing steel, plaintiff had on the job a foreman of long experience in reinforcing steel work, under whose direct supervision and instruction all of the reinforcing steel laborers worked. The Government Employment Office, at Roanoke, Virginia, from which plaintiff obtained his laborers in accordance with the provisions of the contract, was unable to supply skilled mechanics for reinforcing steel work but that office was able to and did supply workers who had had sufficient experience in this type of work to qualify them for classification for semiskilled work. They were able to do the work for which they were furnished. But when it was ruled that plaintiff could only use skilled mechanics
133 on this work plaintiff had to let many of the men go. (See letter of April 25, 1934, of contracting officer, finding 17.)

There is no evidence whatever in this record to show who, in the Public Works Administration in Washington, made the statement which the administrative assistant for the Veterans Placement Service in the Department of Labor, at Washington, transmitted by letter

of March 20, to the supervising superintendent of construction on the basis of which plaintiff was required to classify reinforcing steel work as skilled labor and to pay reinforcing steel workers at the rate of $1.10 an hour. It would appear that because the answer to the question as submitted in the letter of March 15, was so obvious the matter was not given serious consideration by either the Department of Labor or the Public Works Administration inasmuch as it was handled by the Veterans' Placement Service in the Department of Labor. No one connected with plaintiff's contract knew or now knows from whom Hollenbeck got the information which he transmitted to defendant's supervising superintendent of construction. Whoever passed upon his request as stated in the letter of March 15, had to assume that only two grades or classifications of labor were authorized by the contract (which was the sole question in issue) and if this had been true there would have been justification for the statement transmitted to the defendant's representative. Plaintiff never paid nor claimed that men engaged on reinforcing steel work should be paid at the common-labor minimum wage rate. There was at one time subsequent to March 20, an allegation by defendant's supervising superintendent's assistant that plaintiff had paid some of the reinforcing steel workers the common labor wage rate of 45 cents per hour, but this was not true. The action, for which defendant is responsible, as to the manner in which the labor classification question was disposed of and enforced, was arbitrary, capricious, and so grossly erroneous as to imply bad faith.

Counsel for the defendant contend that plaintiff is barred from recovering on this and other similar items because he did not submit the matter of whether the contract authorized the use of an intermediate grade of labor at an intermediate wage rate to the
134 Board of Labor Review for decision. But we think this contention is without merit for the reason that the question involved was not a labor issue within the meaning of Art. 15 and Art. 18 (f), but was simply a question whether the contract contemplated and, therefore, authorized the use of an intermediate grade of labor at an intermediate minimum wage rate. This question had already been considered, decided, and settled by the Administrator of the Federal Emergency Administration of Public Works six months before the defendant's supervising superintendent of construction and his assistant conceived the idea in March 1934 that they would force plaintiff to pay all employees not clearly falling within the common labor class the minimum wage rate of $1.10 an hour provided for skilled mechanics. Moreover, neither the contracting officer nor the supervising superintendent ever considered the question one for submission to the Board of Labor Review, and even if the question had been one proper for submission to the Board of Labor Review, it was the duty of the defendant to submit it to the Board since it was the defendant, and not the contractor or labor, who raised the question. The contract (Art. 15) did not provide that "all issues concerning labor" shall be decided by the Board. Instead it pro-

vided that "all labor issues which cannot be satisfactorily adjusted by the contracting officer shall be submitted" to the Board. The contract was wholly written by defendant and any doubt that might exist as to whether plaintiff should be held barred, because the real question was not submitted to the Board, must be resolved against the defendant. The common understanding of a statement that an issue shall be submitted to a certain tribunal without indicating who shall submit it is that the person who raises the issue shall be the one to submit it.

Plaintiff is entitled to recover $8,657.05 under this item of the claim.

ITEM FIVE

This item of the claim as established by the evidence is $26,354.19 and represents the difference between the intermediate minimum prevailing wage rates of 60 and 65 cents an hour fixed and paid by plaintiff for semi-skilled carpentry work and the minimum of $1.10 an hour which the defendant compelled plaintiff to pay for such
135 work. See finding 18. This item of the claim is governed by what has been said under the preceding Item 4. What has been there said is applicable here. Plaintiff is entitled to judgment.

ITEM SIX

This item of the claim as established by the proof is $9,730.27 and represents the difference between the intermediate prevailing minimum wage rate paid by plaintiff's subcontractor, the Roanoke Marble & Granite Co., Inc., for labor of a semiskilled classification and the minimum of $1.10 an hour which the defendant compelled that contractor to pay for such semiskilled labor on the same grounds, for the same reasons and under the same circumstances as set forth under Item 4 above. See finding 19. The only difference between this item and the preceding items 4 and 5 is that the contracting officer finally decided the question in favor of the contractor as he had contended all along as to all three of the items. In other words the contracting officer decided and ruled in writing on January 14, 1935, that the contract did contemplate, and provide for intermediate classifications of labor at a minimum wage rate between that fixed for skilled labor and unskilled or common labor. However, plaintiff was not reimbursed for the excess cost which he had been ordered to pay. Plaintiff is entitled to judgment for the amount of this item.

ITEM SEVEN

Under this item of the claim plaintiff seeks to recover $15,180.52 on the ground that the contract and specifications provided for the use of "commercial" sandstone and that the contracting officer required plaintiff to use silica sandstone locally available and acquired, which, it is contended, was not sandstone within the meaning of the specifications.

The facts with reference to this claim are set forth in finding 21. The specifications provided that "Stone work indicated on drawings as rubble shall be a random broken range ashlar * * * local sandstone, as hereinafter specified. * * *. All rubble or broken range ashlar stone work shall be a local sandstone of a buff color, with a variegated run of quarry color, the darker shades pre-
136 dominating." When making his bid plaintiff assumed that there was available locally a soft standstone that could be easily sawed into shape. Without making any investigation with reference to the matter, plaintiff wired a man near Roanoke, who, plaintiff had been advised, owned a quarry, for the price which he could supply sandstone. Plaintiff received a reply quoting a price. Plaintiff made his bid accordingly. Plaintiff further assumed that the price quoted contemplated delivery of the sandstone at the site of the work. Later, after the contract with defendant had been made, plaintiff found that the owner of the stone had no operating quarry, that the stone was covered with overburden and that the price which had been quoted to him was for unquarried stone. Plaintiff further found that the local stone was not the kind of sandstone which he had in mind when he made his bid; that the only stone which could be obtained locally was too hard and abrasive to be worked with a saw but had to be split or cut into proper shape and thickness with other tools. Plaintiff protested being required to use this stone and endeavored to have the contracting officer allow him to use Tennessee or Ohio brown sandstone which was of a softer grade and could be sawed and more easily cut into shape, which stone, the proof shows, could have been purchased by plaintiff and delivered on the job at a cost of $15,180.52 less than it cost plaintiff to quarry, haul, and cut the local sandstone.

The proof is not sufficient to justify the allowance of the whole or any part of this item of the claim. The contract did not call for "commercial sandstone" as that term may have been understood by plaintiff. It called for "local sandstone." There are several grades of sandstone. The proof is not sufficient to show that the local stone which plaintiff was required to use did not come within the definition of the word "sandstone" or that it was not sandstone within the meaning of the specifications. The definition of the word "sandstone" in petrology, as given in Webster's New International Dictionary, is "a sedimentary rock consisting of sand, usually quartz, more or less firmly united by some cement, as silica, iron oxide, or calcium carbonate. Sandstones vary in color, being commonly red, yellow, brown,
137 gray, or white." There was no soft sandstone of the character which plaintiff had in mind to be found locally.

The proof does not show what portion of the $28,614.32, which it cost plaintiff to unburden, quarry and deliver the local sandstone to the site of the work, represented the cost of uncovering and quarrying the stone which he did not contemplate he would have to do. Plaintiff is not entitled to recover on this item of the claim.

Judgment will be entered in favor of plaintiff for $130,911.08. It is so ordered.

JONES, Judge; and WHALEY, Chief Justice, concur.
WHITAKER, Judge, took no part in the decision of this case.

Dissenting opinion

MADDEN, Judge, dissenting in part.

I am unable to agree with the disposition which the Court has made of items 2, 3, 4, 5, and 6 of plaintiff's claim. These items appear in Finding 13 and relate to the requirement that outside scaffolding be used, to unfair conduct of the defendant's Superintendent and Inspector, to increased wages paid to reenforcing steel rodmen and carpenters, and to increased costs and wages resulting from rulings made with reference to the stone workers and terrazzo grinders.

In each of these situations a serious dispute arose between plaintiff and the defendant's agent on the job. Plaintiff, instead of submitting the disputes to the Contracting Officer and insisting upon a ruling which he could appeal to the Head of the Department, as he had a right to do under Article 15 of the contract, either acquiesced in the Superintendent's ruling, or took the matter up informally with the Contracting Officer and acquiesced in his statement that he could not give plaintiff any relief.

I think the Government has the right to contract, if the contractor is willing, that the Government shall not be subjected to damage suits for disagreements between its inferior agents and the contractor, without giving the Head of the Department an opportunity to right the alleged wrong before it has grown into a big claim against the public funds. And the fact that the inferior agent on the job does not act in good faith does not make it less necessary that his superiors, who presumably would deal fairly with the contractor, should have
138 an opportunity to pass upon the dispute. Fitzgibbons v. U. S., 52 C. Cls. 164. See also Silas Mason v. U. S., 90 C. Cls. 266.

If a contractor concludes, as plaintiff apparently did, that he can get along better, on the whole, by pursuing a policy of appeasement of the Superintendent on the job, than by asserting and insisting upon his rights, he should not expect the Government to pay him the cost of the policy which he elected to follow.

139 *V. Judgment*

October 5, 1942

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover $130,911.08.

It is therefore adjudged and ordered that plaintiff recover of and from the United States one hundred thirty thousand, nine hundred eleven dollars, and eight cents ($130,911.08).

141 *VI. Proceedings after entry of judgment*

On December 4, 1942, the defendant filed a motion for a new trial.

On January 5, 1943, the defendant filed a motion for an oral argument on its motion for new trial.

On February 1, 1943, the defendant's motion for new trial was argued by Assistant Attorney General Francis M. Shea for defendant, and by Mr. H. C. Kilpatrick for plaintiff, and submitted.

On March 1, 1943, the court entered the following order on said motion:

ORDER

It is ordered this 1st day of March 1943 that the defendant's motion for new trial be and the same is hereby overruled.

143 On April 15, 1943, the Defendant filed a request for record in re certiorari, together with portions of the typewritten transcript of evidence which it deems material to errors to be assigned, under Rule 99 (b).

On April 24, 1943, the Plaintiff filed portions of the typewritten transcript of testimony, which it deems material to the errors to be assigned.

145 *VII. Order settling and approving transcript of record material to the errors assigned on petition for certiorari*

April 28, 1943

The United States has filed with this court the eleven assignments of error to be included in its petition for writ of certiorari and an application for a transcript of the portions of the record deemed by it to be material to the errors assigned under the act of May 22, 1939 (53 Stat. 752), U. S. Code, Title 28, section 288; Rule 41 of the Supreme Court as amended March 25, 1940 (309 U. S. 701, 702), and Rule 99 (a) and (b) of this court.

The plaintiff, Algernon Blair, has filed a transcript of additional portions of the testimony for inclusion in the record accompanying defendant's petition for certiorari.

The clerk will certify to the Supreme Court, as true and correct, the following portions of the record in this court determined and settled by the court to be the portions of such record material to the errors assigned:

1. The pleadings;
2. The court's special findings of fact;
3. The exhibits of record made a part of the findings of fact by reference;
4. The conclusion of law;
5. The judgment of the court;

6. The opinion of the court, and the dissenting opinion of Madden, Judge;

7. The order of the court overruling defendant's motion for a new trial;

146 8. The transcript of the testimony filed by the defendant—Volume 1, parts 1 and 2, and Volume 2, parts 1 and 2—4 volumes;

9. The transcript of the testimony filed by the plaintiff (one volume);

10. The originals of plaintiff's exhibits: Nos. 1 to 11, incl.; 11-A to 15, incl.; 12 to 15, incl.; 21 to 23, incl.; 23-A to 53, incl.; 55; 45-A to 47-A, incl. 53-A; 54-A; 56 to 70, incl.; 71-A, B and C, incl.; 73 to 79, incl.; 80-A and B; 81 to 90, incl.; 92 to 104, incl.; 107 to 156, incl.; and the originals of defendant's exhibits A to Z, incl.; AA to MM, incl.; and stipulation No. 1—all as set forth in a list filed by defendant as a part of the transcript desired by it.

By the court:

RICHARD S. WHALEY,
Chief Justice.

APRIL 28, 1943.

147 *VIII. Clerk's note re other parts of the record material to the errors assigned*

For other parts of the record material to errors assigned filed by defendant in Volume 1, parts 1 and 2, and Volume 2, parts 1 and 2—(4 volumes); and other parts of the record filed by Plaintiff in one volume, are forwarded herewith under separate cover; together with all of original exhibits requested.

149 [Clerk's certificate to foregoing transcript omitted in printing.]

Endorsement on cover: File No. 47559. Court of Claims. Term No. 1058. The United States, Petitioner vs. Algernon Blair, Individually, and to the use of Roanoke Marble & Granite Company, Inc. Petition for a writ of certiorari and exhibit thereto. Filed May 29, 1943. Term No. 1058 O. T. 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1943